Supreme Court, U.S.
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No. 08-

IN THE

Supreme Court of the United States

SUNOCO, INC., SUN OIL COMPANY,
and CORDERO MINING COMPANY,

Petitioners,

v.

THOMAS McDONALD, MARIAN McDONALD,
and ALEX E. McDONALD,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Section 309 of the Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. § 9658), which pre-empts "limitations periods" "specified in the State statute of limitations or under common law," includes and pre-empts state statutes of repose. There is a conflict between the United States Court of Appeals for the Ninth Circuit and the United States Court of Appeals for the Fifth Circuit on this question.

PARTIES TO THE PROCEEDING

Additional parties to the proceedings below that are not identified in the caption to the case are Third Party Defendants J.T. Batterson and Susan Batterson.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioners submit the following statement of their corporate affiliations for the use of the Justices of this Court:

1. Petitioner Sunoco, Inc. is the successor in interest to Sun Company, Inc. (R&M), which owned 100% of Petitioner Sun Oil Company and Petitioner Cordero Mining Company.

2. Petitioner Sunoco, Inc. is a publicly traded company, which has no parent corporation. To the best of its knowledge, no single shareholder owns 10% or more of its stock.

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Petitioners Sunoco, Inc., Sun Oil Company, and Cordero Mining Company (collectively, "Sunoco") respectfully seek a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Ninth Circuit (Appendix ("App.") 1a-25a) is reported at 548 F.3d 774. The Order and Opinion of the District Court (App. 26a -63a) is reported at 423 F. Supp. 2d 1114.

JURISDICTION

The judgment of the Court of Appeals was entered on November 19, 2008. The Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 9658 provides:

> **Actions under state law for damages from exposure to hazardous substances**
>
> **(a) State statutes of limitations for hazardous substance cases.**
>
> (1) Exception to state statutes. In the case of any action brought under State law for personal injury, or property damages, which are caused or contributed to by exposure to any hazardous substance, or

pollutant or contaminant, released into the environment from a facility, if the applicable limitations period for such action (as specified in the State statute of limitations or under common law) provides a commencement date which is earlier than the federally required commencement date, such period shall commence at the federally required commencement date in lieu of the date specified in such State statute.

(2) State law generally applicable. Except as provided in paragraph (1), the statute of limitations established under State law shall apply in all actions brought under State law for personal injury, or property damages, which are caused or contributed to by exposure to any hazardous substance, or pollutant or contaminant, released into the environment from a facility.

(3) Actions under section 107 [42 U.S.C. § 9607]. Nothing in this section shall apply with respect to any cause of action brought under section 107 of this Act [42 U.S.C. § 9607].

(b) Definitions. As used in this section —

(1) Title I [42 U.S.C. §§ 9601 *et seq.*] terms. The terms used in this section shall have the same meaning as when used in title I of this Act [42 U.S.C. §§ 9601 *et seq.*].

(2) Applicable limitations period. The term "applicable limitations period" means the period specified in a statute of limitations during which a civil action referred to in subsection (a)(1) may be brought.

(3) Commencement date. The term "commencement date" means the date specified in a statute of limitations as the beginning of the applicable limitations period.

(4) Federally required commencement date.

(A) In general. Except as provided in subparagraph (B), the term "federally required commencement date" means the date the plaintiff knew (or reasonably should have known) that the personal injury or property damages referred to in subsection (a)(1) were caused or contributed to by the hazardous substance or pollutant or contaminant concerned.

(B) Special rules. In the case of a minor or incompetent plaintiff, the term "federally required commencement date" means the later of the date referred to in subparagraph (A) or the following:

(i) In the case of a minor, the date on which the minor reaches the age of majority, as determined by State law, or has a legal representative appointed.

(ii) In the case of an incompetent individual, the date on which such individual becomes competent or has had a legal representative appointed.

Oregon Revised Statutes § 12.115 provides:

Action for negligent injury to person or property.

(1) In no event shall any action for negligent injury to person or property of another be commenced more than 10 years from the date of the act or omission complained of.

(2) Nothing in this section shall be construed to extend any period of limitation otherwise established by law, including but not limited to the limitations established by ORS 12.110.

STATEMENT OF THE CASE

Section 309 of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9658, pre-empts the trigger date for "limitations periods" "as specified in the State statute of limitations or under common law." Below, the United States Court of Appeals for the Ninth Circuit held that the term "statute of limitations" in Section 309 includes, and Section 309 therefore pre-empts, state statutes of repose. The Ninth Circuit holding is in direct conflict with a ruling by the Fifth Circuit, which held that Section 309 does not pre-empt statutes of repose because "[t]he plain language of [§ 309] . . . refers to state statutes of limitations —not state statutes of repose." *Burlington N. & Santa Fe Ry. Co. v. Skinner Tank Co.*, 419 F.3d 355, 364 (5th Cir. 2005). The Ninth Circuit's decision is contrary to this Court's CERCLA and pre-emption jurisprudence, pursuant to which congressional intent must not be inferred from a term or phrase absent in CERCLA.

Factually, this case arises out of a land sale from Petitioner Sun Oil Company, which was wholly owned by a predecessor in interest to Petitioner Sunoco, Inc.,[1] to Respondents Tom and Marian McDonald ("McDonalds"). The McDonalds allege that when they purchased the property from Sunoco in 1973, Sunoco orally misrepresented that former mercury mining operations on the land had removed all mercury from rock known as calcine, when in fact "trace amounts" remained. The McDonalds allege they lost the value that

1. Petitioners Sunoco, Inc., Sun Oil Company, and Cordero Mining Company are collectively referred to herein as "Sunoco."

would have been associated with mercury-free calcine and will incur costs in removing calcine that they spread on their private road. *See* App. 29a.

The McDonalds sued Sunoco in Jefferson County Circuit Court in the State of Oregon, under state law. Sunoco removed the case to the United States District Court for the District of Oregon on the basis of diversity jurisdiction. The McDonalds ultimately filed a third amended complaint, adding claims for negligence and negligence *per se*, and seeking a declaratory judgment.

After the completion of discovery, the district court granted Sunoco's motion for summary judgment, dismissing all of the McDonalds' claims, including the negligence claim. The district court ruled that the negligence claim was barred by Oregon's ten year Statute of Repose because it was brought more than thirty years after the act complained of — the alleged failure to warn and test the calcine at the time of the sale of the property. Or. Rev. Stat. § 12.115(1); App. 45a. The Oregon Statute of Repose bars the McDonalds' negligence claim unless it is pre-empted by CERCLA Section 309. App. 9a.

The CERCLA provision at issue (CERCLA Section 309), pre-empts the date that certain "state statute[s] of limitations" begin to run on an accrued claim for damages related to hazardous substances. 42 U.S.C. § 9658(a)(1). If the state statute of limitation begins to run on such a claim before the plaintiff knows of the damages and their cause, Section 309 inserts a rule of discovery. The duration of the state statute of limitation still applies, but it must begin to run on the basis of the

"federally required commencement date," which is the date the plaintiff "knew (or reasonably should have known)" of the damages and their cause. 42 U.S.C. §§ 9658(a)(1), (b)(4)(A).

The district court ruled that Section 309 did not pre-empt Oregon's Statute of Repose. App. 43a–45a. The district court relied on *Burlington Northern*, 419 F.3d at 362, which held that Section 309 does not pre-empt statutes of repose because in the plain language of Section 309 there is "no mention of peremptory statutes or statutes of repose." *Id.* at 362. The district court reasoned under *Burlington* that

> 'the plain language of § 9658 does not extend to statutes of repose' but only to statutes of limitation and that the 'differences between statutes of limitations and statutes of repose are substantive, not merely semantic.'

App. 44a (*quoting Burlington Northern*, 419 F.3d at 362). The district court dismissed the McDonalds' negligence claim on this basis, and subsequently entered its Order of final judgment on all of the McDonalds' claims. App. 64a.

The McDonalds appealed the dismissal of their claims for negligence, breach of contract, fraud, and contribution under Or. Rev. Stat. § 465.325. The Ninth Circuit affirmed the district court's dismissal of all claims except the negligence claim. In evaluating whether CERCLA Section 309 pre-empted the Oregon Statute of Repose, the Ninth Circuit recognized that the term "statute of repose" does not appear in Section

309. The court also recognized that statutes of limitation and statutes of repose are "distinct legal concepts with distinct effects." App. 7a. However, the Ninth Circuit stated "[t]he term 'statute of limitations' was ambiguous regarding whether it included statutes of repose when § 309 was enacted in 1986." App. 10a. The Ninth Circuit also stated "some cases recognized the differences between statutes of limitation and repose [but] a number of cases confused the terms or used them interchangeably." App. 10a.

On this basis, the Ninth Circuit then referenced two aspects of the legislative history. The first was a congressionally commissioned CERCLA study report that discussed the effects of state statutes of limitation, but separately recommended the "repeal of the statutes of repose which, in a number of states have the same effect as some statutes of limitation in barring plaintiff's claim before he knows that he has one." App. 14a (*quoting* CERCLA Section 301(e) Study Group Report). The second was a House Conference report stating: "[i]n the case of a long-latency disease, such as cancer, a party may be barred from bringing his lawsuit if the statute of limitations begins to run at the time of the first injury — rather than from the time when the party 'discovers' [the injury and its cause]." App. 15a.

On the bases of the foregoing two reports and its finding that the term "statute of limitation" was ambiguous, the Ninth Circuit held that "it is evident that the term 'statute of limitations' in § 309 was intended by Congress to include statutes of repose." App. 16a. The Ninth Circuit therefore found that Section 309 pre-empted the Oregon Statute of Repose, reviving the McDonalds' negligence claim.

The Ninth Circuit rejected the rule in the Fifth Circuit, distinguishing *Burlington Northern* based on factual differences and also criticizing the Fifth Circuit because it "failed to analyze the meaning of 'statute of limitations' at the time § 309 was adopted." App. 14a. The Fifth Circuit, by contrast, had looked to the "ordinary meaning of the words used" in Section 309, *Burlington Northern*, 419 F.3d at 362 (*quoting Am. Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982)), including 'statute of limitations,' and found it was "bound by that plain language," *id.* at 364.

Review from this Court is now warranted to reconcile the conflicting views of the Ninth and Fifth Circuits regarding whether Section 309 of CERCLA pre-empts state statutes of repose, and to remove the confusion on this important question in the lower federal and state courts.

REASONS FOR GRANTING THE PETITION

In this case, the Ninth Circuit effectively re-drafted Section 309 of CERCLA by adding a non-existent provision pre-empting state statutes of repose. The Ninth Circuit's decision intrudes into an area of law traditionally belonging to the states and runs contrary to this Court's CERCLA jurisprudence, this Court's pre-emption doctrine, and a ruling on the same issue by the Fifth Circuit. The conflict between the Ninth and Fifth Circuits exemplifies similar conflict and disarray on the same issue in some federal district and state courts. A ruling from this Court is needed to reconcile the split in the Circuits and end the confusion below.

I. The Ninth Circuit's Opinion Re-Writes CERCLA Section 309 By Effectively Inserting New Language into the Statute

CERCLA Section 309 partially pre-empts "limitations period[s]" "*as specified in the State statute of limitations or under common law.*" 42 U.S.C. § 9658(a)(1) (emphasis added). It operates by imposing a discovery rule on those state limitation periods that do not already contain one. *Id.* Specifically, Section 309 requires that any such "limitations period" begin running only on the "federally required commencement date" ("FRCD") if that is earlier than the period provided in the state "limitations period." *Id.*; 42 U.S.C. § 9658(b)(4)(A). The FRCD is "the date the plaintiff knew (or reasonably should have known) that the personal injury or property damages . . . were caused or contributed to by the hazardous substance . . . ." *Id.* Accordingly, where it applies, Section 309 changes the

trigger date, but notably not the duration or other aspects, of the applicable state limitation period. *See* 42 U.S.C. §§ 9658(a)(1), (a)(2).

Section 309 states on its face that it applies to "the applicable limitations period," and this is defined as "the period specified in a *statute of limitations* during which a civil action [for damages from hazardous substances] may be brought." 42 U.S.C. § 9658(b)(2) (emphasis added). Section 309 contains no provision applicable to statutes of repose, which are unmentioned in Section 309 or CERCLA in its entirety.

The Ninth Circuit's opinion re-writes the text of Section 309 by adding state statutes of repose. Specifically, the Ninth Circuit ruled that Oregon's ten year Statute of Repose, which bars claims brought more than ten years after the "act or omission complained of," Or. Rev. Stat. § 12.115, did not bar the McDonalds' state tort claims (brought nearly thirty years after the act complained of) because CERCLA Section 309 pre-empted the Oregon Statute of Repose. App. 7a. This holding conflicts with the express language in both Sections 309(a)(1) and 309(b)(2) limiting pre-emption to a "State statute of limitations."

There is a fundamental distinction between statutes of limitations and repose that has long been recognized throughout state and federal jurisprudence. Statutes of limitation begin to run when a cause of action "accrues" — i.e., when a plaintiff incurs damages and a claim therefore legally exists or, in the language of Section 309, when the claim "may be brought." 42 U.S.C. § 9658(b)(2); *Bay Area Laundry & Dry Cleaning*

Pension Trust Fund v. Ferbar Corp., 522 U.S. 192, 201 (1997) ("All statutes of limitation begin to run when the right of action is complete . . . .") (*quoting Clark v. Iowa City*, 87 U.S. 583 (1875). Statutes of repose, like the Oregon Statute of Repose in this case, by contrast, run from the "date of the act or omission complained of," regardless of when or whether a claim ever accrues, and regardless of when or whether damages are incurred. *See* Or. Rev. Stat. § 12.115(1); App. 7a ("statutes of repose are designed to bar actions after a specified period of time has run from the occurrence of some event other than the injury which gave rise to the claim") (*quoting Raithaus v. Saab-Scandia of America, Inc.*, 784 P.2d 1158, 1160 (Utah 1989)).

Individually and together, CERCLA Sections 309(a)(1) and 309(b)(2) apply not to statutes of repose, but only to those state laws that govern the "period . . . during which a civil action . . . may be brought," 42 U.S.C. § 9658(b)(2), "as specified in the State statute of limitations or under common law," 42 U.S.C. § 9658(a)(1). A statute of repose like the Oregon statute is not a "statute of limitation" nor is it "common law," and it is not triggered only once a "civil action . . . may be brought," as is the case with statutes of limitation. *See* Or. Rev. Stat. § 12.115(1). It begins running earlier, once the initial "act" occurs, regardless of whether a cause of action exists at that point. *Id.*

The Ninth Circuit acknowledged the important distinctions between statutes of limitation and repose. App. 7a ("Statutes of limitations and statutes of repose are distinct legal concepts with distinct effects."). The Ninth Circuit's opinion therefore makes no "textual sense" in light of Section 309's express inclusion of statutes of limitations and exclusion of statutes of repose. *See United States v. Atl. Research Corp.*, 127 S. Ct. 2331, 2336 (2007) (rejecting an interpretation of CERCLA that made "little textual sense").

Because a statute of repose begins to run when the act or omission occurs, not when the resulting injury occurs or is known, the federally required commencement date applicable under Section 309 cannot be applied to a statute of repose without invalidating the statute of repose altogether. *See* Or. Rev. Stat. § 12.115; § IV, *infra*. The FRCD runs from when a party "knew (or reasonably should have known)" it was injured by a hazardous substance, not from when the initial act or omissions occurred. Thus, in the context of "hazardous substances" claims, the Ninth Circuit's ruling invalidates state statutes of repose entirely, converts them to statutes of limitation, and then inserts the CERCLA discovery rule. This has no support in the text of CERCLA. Certiorari is warranted to avoid such judicial redrafting of a federal statute, and avoid federal vitiation of a state statute without a federal mandate.

II. The Ninth Circuit and Fifth Circuit Are in Conflict, as Are Other Courts

The Ninth Circuit's addition of "statute of repose" to Section 309 conflicts with an earlier ruling by the Fifth Circuit in *Burlington Northern*, 419 F.3d at 363. In *Burlington Northern*, the Fifth Circuit ruled that Section 309 does not pre-empt state statutes of repose because the express language of Section 309 is limited to statutes of limitation, and the two types of statutes are different. The Fifth Circuit stated: "The plain language of § 9658, however, refers to state statutes of limitations — not state statutes of repose. This court is bound by that plain language, absent express congressional intent to the contrary. Congress did not express a contrary intent in this instance." *Id.* at 364.

The Ninth Circuit attempted to distinguish *Burlington Northern* based on *dicta* and factual differences that were irrelevant to the Fifth Circuit's holding on this purely legal question of federal statutory interpretation. The Ninth Circuit noted that the plaintiff in *Burlington Northern* had knowledge of his damages prior to the expiration of the Texas statute of repose, whereas the McDonalds alleged they did not discover their damages until after the expiration of the Oregon Statute of Repose. App. 13a-14a ("[b]ecause the discovery in *Burlington Northern* occurred prior to the expiration of time under the statute of repose, § 309's policies against destroying a plaintiff's claims before they could be asserted underlying § 309 were not in issue" in *Burlington Northern*).

This distinction was immaterial because the Fifth Circuit did not base its ruling on whether the plaintiff was on notice but on whether Section 309 applied to a statute of repose in the first place. There is no escaping that the Ninth and Fifth Circuit opinions conflict. Perhaps for this reason, the Ninth Circuit attacked the Fifth Circuit's reasoning, arguing that it "failed to analyze the meaning of 'statute of limitations' at the time § 309 was adopted." App. 14a. The Fifth Circuit, however, need not have analyzed the meaning of "statute of limitations" because the Fifth Circuit found no ambiguity in the plain language of Section 309 or in the term "statute of limitations," and "[in] cases involving statutory construction, a court begins with the plain language of the statute." *Burlington Northern*, 419 F.3d at 362 ("the reach of the plain language of § 9658 does not extend to statutes of repose").

While both the Ninth and Fifth Circuits found that statutes of repose and statutes of limitation are different, the Ninth Circuit assumed Congress did not know what the term "statute of limitations" meant when it limited CERCLA preemption to a "State statute of limitations." The Ninth Circuit thus re-wrote the statute to include statutes of repose, whereas the Fifth Circuit presumed that Congress chose the language of Section 309 intentionally, and gave the language of the provision its plain and ordinary meaning.

The conflict between the Ninth and Fifth Circuits exemplifies broader confusion in federal and state courts, which have reached conflicting rulings regarding the pre-emptive effect of Section 309 with regard to

state laws of repose. *See, e.g., Evans v. Walter Indus., Inc.*,, 579 F. Supp. 2d 1349, 1363-64 (N.D. Ala. 2008) (following *Burlington Northern*, holding that Section 309 does not pre-empt the Alabama rule of repose); *German v. CSX Transp., Inc.*, 510 F. Supp. 2d 630, 633-34 (S.D. Ala. 2007) (following *Burlington Northern*, holding no Section 309 pre-emption of state common law rule of repose); *Fisher v. Ciba Specialty Chems. Corp.*, No. 03-0566, 2007 U.S. Dist. LEXIS 76174, at *64-67 (S.D. Ala. Oct. 11, 2007) (distinguishing *Burlington Northern*, ruling that CERCLA pre-empts the state common law rule of repose); *Abrams v. Olin Corp.*, 248 F.R.D. 283, 290 (S.D. Ala. 2007) (holding that Section 309 pre-empts the state common law rule of repose); *A.S.I., Inc. v. Sanders*, 835 F. Supp. 1349, 1358 (D. Kan. 1993) (Section 309 pre-empts Kansas statute of repose); *Clark County v. Sioux Equip. Corp.*, 753 N.W. 2d 406, 417 (S.D. 2008) (Section 309 does not pre-empt a statute of repose); *Angeles Chemical Co. v. Spencer & Jones*, 4th Cal. App. 4th 112, 117, 126 (Cal. Ct. App. 1996) (Section 309 "eliminat[es]" the statute of repose).

In fact, the district court in this case, which ruled Section 309 does not pre-empt statutes of repose, had previously ruled the opposite in another case. *Buggsi, Inc. v. Chevron U.S.A., Inc.*, 857 F. Supp. 1427 (D. Or. 1994). While the district court's subsequent decision in this case was more consistent with the statute, it is plain that absent this Court's review, both federal and state courts will be left in confusion, resulting in needless expenditure of judicial and litigant resources.

III. The Ninth Circuit's Decision Contradicts this Court's CERCLA Jurisprudence

The Ninth Circuit's insertion of the term "statute of repose" into Section 309 conflicts with this Court's direction that where a term is absent from CERCLA, "CERCLA's silence is dispositive" and requiring that CERCLA be strictly construed according to its plain terms. *United States v. Bestfoods*, 524 U.S. 51, 70 (1998) (rejecting a CERCLA specific rule of derivative liability because "such a rule does not arise from congressional silence, and CERCLA's silence is dispositive"); *see also Cooper Indus. v. Aviall Servs., Inc.*, 543 U.S. 157, 167 (2004) (the clear meaning of CERCLA's text must control, regardless of the "principal concerns of our legislators").

Most recently, in *Atlantic Research Corp.*, 127 S. Ct. at 2336, this Court cautioned against adopting a "textually dubious construction" that would threaten the meaning of the provision as a whole, *id* at 2337, or "destroy the symmetry" between sections, *id.* at 2336. Ignoring this injunction, the Ninth Circuit opinion, by incorporating statutes of repose into the term 'statute of limitations' in Section 309 "destroy[s] the symmetry" between Section 309(a)(1) (referring to "applicable limitations period . . . as specified in the State statute of limitations . . ."), Section 309(b)(2) (defining "applicable limitations period" with reference to a "statute of limitations" governing when an accrued claim "may be brought"), and Section 309(b)(4)(A) (defining FRCD as the date the plaintiff knew of his "personal injury or property damages" and their cause). Statutes of repose are unrelated to concepts of accrual, knowledge, and

damages, the mandatory factors under Sections 309(a)(1), (b)(2), and (b)(4)(A). *See* 42 U.S.C. §§ 9658(a)(1), (b)(2), (b)(4)(A).

More fundamentally, there simply is no reference to a statute of repose in Section 309, and the Ninth Circuit's "textually dubious construction" thus runs contrary to *Atlantic Research*, as well as the rest of the Court's line of CERCLA jurisprudence. Therefore, the petition should be granted in order to help preserve the integrity of this Court's CERCLA jurisprudence.

IV. The Ninth Circuit's Interpretation Conflicts with this Court's Pre-Emption Jurisprudence

In ruling that Section 309 pre-empts the Oregon Statute of Repose, the Ninth Circuit pre-empted state law, contrary to the criteria that govern pre-emption. Adherence to this Court's pre-emption jurisprudence was required here because the Ninth Circuit pre-empted a state statute of repose, a substantive state law that falls squarely within the "historic power of the State." *Raygor v. Regents of the Univ. of Minn.*, 534 U.S. 533, 543 (2002) ("allowing federal law to extend the time period in which a state sovereign is amenable to suit in its own courts at least affects the federal balance in an area that has been a historic power of the States").

The governing principle in evaluating whether a federal statute such as Section 309 pre-empts such state statutory law, is:

> [w]hen "Congress intends to alter the 'usual constitutional balance between the States and

> the Federal Government,' it must make its intention to do so '*unmistakably clear* in the language of the statute.'" . . . This principle applies when Congress "intends to pre-empt the historic powers of the States . . . ." In such cases, the clear statement principle reflects "an acknowledgement that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere."

Raygor, 534 U.S. at 543-44 (internal citations omitted); *see also Rice v. Santa Fe Elevator Corp*, 331 U.S. 218, 230 (1947) ("we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress").

Congress did not come close to imposing "an unmistakably clear" or "clear and manifest" intent to pre-empt the statute of repose with Section 309 as required by this Court. *See Rice* 331 U.S. at 230 (Congressional intent to pre-empt must be "clear and manifest"). The term 'statute of repose' appears nowhere in the CERCLA. The Ninth Circuit asserted that the use of the term "statute of limitations" was ambiguous, and read 'statute of repose' into that term and Section 309 based on a tortured reading of the legislative history.[2] But if the Ninth Circuit were correct

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2. The Ninth Circuit found that the term "statute of limitation" was ambiguous on the basis of some misuse of the term "statute of repose" in some cases, App. 10a-11a, and based on two

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that the statute is ambiguous, this is only evidence that the statute demonstrates no "unmistakably clear" or "clear and manifest" intent to pre-empt as required by

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law review articles identifying some confusion in the use of the terms 'statute of limitation' and 'statute of repose,' App. 11a (n.4). In none of the cases identified by the Ninth Circuit was the distinction between statutes of limitation and repose an issue or at all important to the outcome of the case. Where the difference between the two statutes was squarely before a court prior to (and since) enactment of Section 309 in 1986, the court identified important differences between the two statutes. *See, e.g., City of Aurora v. American La France Corp.*, No. 81 C 6638, 1984 U.S. Dist. LEXIS 20667, at *3-4 (N.D. Ill. Jan. 6, 1984) (two statutes differ); *Chamberlain v. Schmutz Mfg. Co., Inc.*, 532 F. Supp. 588, 590 (D. Kan. 1982) (discussing differences between statutes of limitation and repose); *Yarbro v. Hilton Hotels Corp.*, 655 P.2d 822, 825 (Colo. 1982) ("[S]tatutes of repose differ from other statutes of limitation since they may bar a cause of action before it accrues."); *Bauld v. J.A. Jones Constr. Co.*, 357 So. 2d 401, 402 (Fl. 1978) (recognizing the "fundamental difference in character" between statutes of repose and of limitation); *Tindol v. Boston Housing Auth.*, 487 N.E.2d 488, 490 (Mass 1986) (statute of limitations is "of an entirely different legal genre" than a statute of repose).

Petitioners have found no case in this Court turning on the important differences between statutes of limitation and statutes of repose. The Ninth Circuit relied on a number of Supreme Court cases it asserted "confused the terms or used them interchangeably" to support its view that the term "statute of limitation" was an ambiguous term, but none of these opinions evaluated the difference between a statute of limitation and repose. In such cases, the Court was discussing *policies* of repose that underlie limitations periods, and was not confusing or equating statutes of limitation with statutes of repose. The Court's use of the word "repose" in some past cases addressing

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the jurisprudence of this Court. *Altria Group, Inc. v. Good*, 129 S. Ct. 538, 543 (2008) (presumption against pre-emption applies if statute is susceptible of more than one reading); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 147 (1963) (a court is "not to conclude" that Congress intended to pre-empt state law "in the absence of an *unambiguous* congressional mandate to that effect.") (emphasis added); *see also Bates v. Dow Agrosciences, LLC*, 544 U.S. 431, 449 (2005) (faced with two plausible readings of a statute, there is a "duty to accept the reading that disfavors pre-emption").

Based on the Ninth Circuit's premise that the term "statute of limitations" is ambiguous, the Ninth Circuit turned to the legislative history of Section 309. App. 11a-12a, 14a. But this too demonstrates no clear congressional intent to pre-empt statutes of repose. A congressional report compiled prior to the enactment of Section 309 noted the distinction between statutes of limitation and statutes of repose. The omission of statutes of repose from the language of Section 309 in the wake of such discussion of statutes of repose in the legislative history only highlights that Congress was advised of the distinction, and pointedly opted not to include statutes of repose in Section 309. App. 14a (quoting CERCLA study recommending that in addition to adoption of discovery rule on statutes of limitation,

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statutes of limitation does not indicate that statutes of limitation and statues of repose are the same, nor does it support the Ninth Circuit's view that the term "statute of limitations" as used by Congress in Section 309 was ambiguous.

that statutes of repose be "repeal[ed]"). This highlights, if anything, that there was no clear intent to pre-empt statutes of repose with Section 309; Congress left statutes of repose out intentionally.

The term "statute of limitations," which was used in Section 309, is well established in American jurisprudence, *see Bay Area Laundry*, 522 U.S. at 201, and the Ninth Circuit ignored this Court's rule that even if the "text of a pre-emption clause is susceptible of more than one plausible reading, courts ordinarily 'accept the reading that disfavors pre-emption.'" *Altria Group, Inc.* 129 S. Ct. at 543 (*quoting Bates*, 544 U.S. at 449); *Florida Lime & Avocado Growers*, 373 U.S. at 147. The plain meaning of the term "statute of limitations" is not "statute of repose," thus disfavoring inclusion of the term under pre-emption doctrine.

Furthermore, Congress indicated the limited nature of the pre-emption authorized by Section 309 with respect to the statute of limitations. Section 309 provides only for a federal accrual date, and thus changes only the trigger date of statutes of limitation that do not already run based on a "discovery rule." Congress did not eliminate state statutes of limitation, much less repeal statutes of repose with respect to hazardous substances, as would be the case with statutes of repose under the Ninth Circuit's decision. *See* 42 U.S.C. § 9658(a)(2) (providing state statute of limitation applies except as modified in Section 309); H.R. Rep. No. 99-962, at 261 (1986) (Conf. Rep.), *reprinted in* U.S.C.C.A.N. 2835, 3276, 3354 (Section 309 is meant to address "when the statute of limitation begins to run rather than the number of years it runs").

In fact, contrary to Congressional intent with respect to the statute of limitations, the Ninth Circuit opinion has the effect of vitiating statutes of repose in hazardous substances cases because the very nature of a trigger date for a statute of repose is that it runs from the act complained of rather than accrual, knowledge, or reason to know of a cause of action. Or. Rev. Stat. § 12.115(1). By imposing the contrary requirements of the FRCD on statutes of repose, the Ninth Circuit essentially renders them statutes of limitation, contrary to state law and contrary to the stringent requirements for pre-emption.

In short, the Ninth Circuit's opinion not only runs contrary to this Court's pre-emption doctrine, it reveals that the Ninth circuit simply gave no consideration to the criteria governing pre-emption. These considerations provide additional grounds to grant certiorari in this case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit should be granted.

Respectfully submitted,

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February 13, 2009

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED NOVEMBER 19, 2008

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 06-35683

D.C. No.

CV-03-01504-ALH

THOMAS MCDONALD; MARIAN MCDONALD; ALEX E. MCDONALD,

Plaintiffs-Appellants,

v.

SUN OIL COMPANY, SUNOCO, INC.; CORDERO MINING COMPANY; J.T. BATTERSON; SUSAN BATTERSON,

Defendants-Appellees.

OPINION

Appeal from the United States District Court for the District of Oregon

Ancer L. Haggerty, District Judge, Presiding

Argued and Submitted

July 10, 2007—Portland, Oregon

Filed November 19, 2008

Before: Harry Pregerson and Stephen Reinhardt

Appendix A

Circuit Judges, and Lyle E. Strom, District Judge.*

Opinion by Judge Strom

OPINION

STROM, District Judge:

Thomas McDonald, Marian McDonald and Alex McDonald appeal from the district court's grant of summary judgment in favor of Sun Oil Company, Sunoco, Inc. and Cordero Mining Company (collectively, "Sun"). The McDonalds sued Sun for, among other things, negligence, contribution, breach of contract and fraud. Each of these claims arose out of an alleged oral warranty that certain crushed rock at the Horse Heaven Mine Property ("Horse Heaven"), a disused mercury mine, was free of mercury. The district court held that Oregon's statute of repose barred the McDonalds' negligence claim, that their claim for contribution failed to comply with an administrative requirement, that their breach of contract claim failed because of the merger doctrine and the parol evidence rule, and that their fraud claim failed to raise a genuine issue of material fact. We have jurisdiction under 28 U.S.C. § 1291, and we affirm in part, reverse in part, and remand for trial.

I. BACKGROUND

In 1934, Ray Whiting Jr. and Harry Hoy developed the Horse Heaven Mine and operated it until 1936. From

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* The Honorable Lyle E. Strom, Senior United States District Judge for the District of Nebraska, sitting by designation.

1936 to 1973, the mine was owned and intermittently operated by Sun. Sun permanently ceased mining operations at Horse Heaven in 1958. In 1973, among over 2,600 acres of property in Jefferson County, Oregon, Sun conveyed Horse Heaven to Thomas and Marian McDonald via a bargain and sale deed. In the deed conveying the property to the McDonalds, Sun reserved "all of the oil, gas, and other mineral rights" in the property to itself, but specifically excluded rights to "surface materials which are used for road-building or construction purposes, such as . . . calcine . . . except such quantities as are reasonably used or useful in the enjoyment of [Sun's] reserved rights." (ER 51.) At the time of this purchase, the Horse Heaven property contained a large pile or piles of calcine tailings.

Calcine is a waste product resulting from the processing of mercury ore into mercury. Mercury sulfide ore is mined, crushed, and heated in a furnace or "retort" to separate mercury from the ore. After the heating process is complete, the crushed rock, now called calcine, is stockpiled. At Horse Heaven, the calcine tailings were deposited in a pile or piles on the surface of the property surrounding the mine. Some mercury still remains in the calcine at Horse Heaven. However, the parties dispute the amount and potential harmfulness of the remaining mercury.

Prior to the 1973 sale of the property, Thomas McDonald met with Ray Whiting and Sun's Wally Freeman at the mine to discuss the potential sale. In his deposition, McDonald testified that while they were standing on the calcine pile prior to the sale, Freeman

told him that because the "retort" process extracted mercury and other heavy metals from the ore, there was no mercury in the calcine. During that same conversation, McDonald told Freeman that he intended to use the calcine for road construction or to sell it commercially as decorative rock.

In 1976, the McDonalds sold all the Jefferson County property except for the forty acres comprising the former Horse Heaven mine. In 1982, the McDonalds transferred these forty acres to Ray Whiting and his wife. Whiting later conveyed his interest in the property to his daughter and grandson. The deed to Whiting reserved to McDonalds the rights to the calcine tailings until 2007. On several occasions, Mr. McDonald brought some of the calcine to his personal residence and placed it on his driveway and parking lot.

In 2001, the Oregon Department of Environmental Quality ("DEQ") requested information regarding possible contamination at Horse Heaven, and in 2002 determined that the McDonalds' handling of the calcine tailings had created an environmental release. The McDonalds were then ordered to refrain from removing or disturbing the calcine piles at Horse Heaven without DEQ approval. The McDonalds allege that they did not learn that the calcine was potentially contaminated until 2001.

On August 25, 2003, the McDonalds sued Sun in Oregon state court. On November 3, 2003, Sun removed the case to the United States District Court for the District of Oregon. On March 14, 2006, the district court

granted summary judgment against the McDonalds on all their claims. This appeal followed. The McDonalds appeal only the district court's rulings granting summary judgment to Sun on their negligence, contribution, contract, and fraud claims.

II. STANDARD OF REVIEW

This Court reviews "*de novo* a district court's decision to grant summary judgment. We must determine, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law." *Del. Valley Surgical Supply, Inc. v. Johnson & Johnson*, 523 F.3d 1116, 1119 (9th Cir. 2008) (citing *Lopez v. Smith*, 203 F.3d 1122, 1131 (9th Cir. 2000) (en banc)). "A factual dispute is genuine only if a reasonable trier of fact could find in favor of the nonmoving party. A mere scintilla of evidence supporting a nonmovant's position is insufficient to withstand summary judgment." *In re Ahaza Sys., Inc.*, 482 F.3d 1118, 1128 (9th Cir. 2007) (quoting *Galen v. County of L.A.*, 468 F.3d 563, 568 (9th Cir. 2006)).

III. DISCUSSION

A. NEGLIGENCE

The district court granted Sun's motion for summary judgment on the McDonalds' negligence claim, holding that the claim is barred by Oregon's statute of repose for negligent injury to person or property, Or. Rev. Stat. § 12.115(1). The McDonalds argue that the

court below erred in applying the Oregon statute because Section 309 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) of 1980, 42 U.S.C. § 9601-9675, grafts a discovery rule onto state statutes of limitations.[1]

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[1] 42 U.S.C. § 9658 (CERCLA § 309) provides:

(a) State statutes of limitations for hazardous substance cases

(1) Exception to State statutes

In the case of any action brought under State law for personal injury, or property damages, which are caused or contributed to by exposure to any hazardous substance, or pollutant or contaminant, released into the environment from a facility, if the applicable limitations period for such action (as specified in the State statute of limitations or under common law) provides a commencement date which is earlier than the federally required commencement date, such period shall commence at the federally required commencement date in lieu of the date specified in such State statute.

* * *

(b) Definitions

* * *

(2) Applicable limitations period

The term "applicable limitations period" means the period specified in a statute of limitations during which a civil action referred to in subsection (a)(1) of this section may be brought.

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We agree. The district court held that CERCLA § 309 does not apply because § 12.115(1) is a statute of repose, not a statute of limitations. However, the term "statute of limitations" in CERCLA § 309 is ambiguous and the legislative history of the section indicates that its meaning includes statutes of repose like § 12.115(1).

Statutes of limitations and repose are distinct legal concepts with distinct effects. "A statute of limitations requires a lawsuit to be filed within a specified period of time after a legal right has been violated . . . On the other hand, statutes of repose are designed to bar actions after a specified period of time has run from the occurrence of some event other than the injury which gave rise to the claim." *Raithaus v. Saab-Scandia of America, Inc.*, 784 P.2d 1158, 1160 (Utah 1989). Statutes of limitations

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(3) Commencement date

The term "commencement date" means the date specified in a statute of limitations as the beginning of the applicable limitations period.

(4) Federally required commencement date

(A) In general

Except as provided in subparagraph (B), the term "federally required commencement date" means the date the plaintiff knew (or reasonably should have known) that the personal injury or property damages referred to in subsection (a)(1) of this section were caused or contributed to by the hazardous substance or pollutant or contaminant concerned.

> preclude[ ] the plaintiff from proceeding, . . . the right (moral or legal) goes on, but the plaintiff simply cannot go to court in order to enforce it . . . . A statute of repose, however, has a more substantive effect because it can bar a suit even before the cause of action could have accrued, or, for that matter, retroactively after the cause of action has accrued. In proper circumstances, it can be said to destroy the right itself. It is not concerned with the plaintiff's diligence; it is concerned with the defendant's peace.

Underwood Cotton Co., Inc. v. Hyundai, 288 F.3d 405, 408-09 (9th Cir. 2002) (internal citations omitted) (referring to the distinctions between the two types of statute as "arcane").

The difference is manifest in Oregon's statutory scheme. For example, Or. Rev. Stat. § 12.110(1), not at issue in this case, is a statute of limitations, providing that "[a]n action for any injury to the person or rights of another, not arising on contract . . . shall be commenced within two years . . . ." Under this statute, it is evident that injury must be experienced before the time limit starts to run because an action cannot be commenced until after the injury element of the *prima facie* case is satisfied. However, the statute of repose at issue here, Or. Rev. Stat. § 12.115(1), states that "[i]n no event shall any action for negligent injury to person or property of another be commenced more than 10 years from the date of the act or omission complained of." This statute does not require injury before it operates.

Therefore, if § 12.115(1) applies to the nearly thirty year old negligence claim in this case, and § 309 does not operate to impose a discovery rule upon it, that claim is barred.

1. Plain Meaning vs. Ambiguity

The first step in construing the meaning of a statute is to determine whether the language at issue has a plain meaning. "The preeminent canon of statutory interpretation requires us to 'presume that [the] legislature says in a statute what it means and means in a statute what it says there.' Thus, our inquiry begins with the statutory text, and ends there as well if the text is unambiguous." *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004) (internal citations omitted). It should not be "presum[ed] that 'the legislature was ignorant of the meaning of the language it employed.'" *Id.* at 186-87. Section 309 contains five uses of the term "statute of limitations," but no use of "statute of repose." Sun argues that "statute of limitations" has a plain meaning which excludes statutes of repose from its ambit. Therefore, according to Sun, it would be improper for a court to graft the words "and repose" onto the already clear language of § 309. "[T]he proper inquiry focuses on the ordinary meaning of the [provision] at the time Congress enacted it," and thus the appropriate question is whether "statute of limitations" was ambiguous when § 309 was passed. *BedRoc Ltd.*, 541 U.S. at 184 (citing *Amoco Prod. Co. v. S. Ute Tribe*, 526 U.S. 865, 874 (1999)); *see also Perrin v. United States*, 444 U.S. 37, 42 (1979) ("A fundamental canon of statutory construction is that, unless otherwise

defined, words will be interpreted as taking their ordinary, contemporary, common meaning."). In addition, it is the plain meaning or ambiguity of CERCLA, not the state statute involved, that this inquiry is concerned with.[2]

The term "statute of limitations" was ambiguous regarding whether it included statutes of repose when § 309 was enacted in 1986. At that time, although some cases recognized the differences between statutes of limitation and repose, a number of cases confused the terms or used them interchangeably.[3] In the legal

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[2] A The question of plain meaning or ambiguity refers to the meaning Congress considered when it passed § 309, and therefore Oregon's opinion of the meaning of the term carries no more weight than does that of any other State. The McDonalds make much of the fact that the Supreme Court of Oregon referred to the statute of repose at issue in this case, Or. Rev. Stat. § 12.115, as a "statute of limitations." *See Joseph v. Burns*, 491 P.2d 203, 207 (Or. 1971). This is relevant to the question of ambiguity merely as an example of a court using the two terms interchangeably, but the fact that it is an Oregon case addressing the statute of repose at issue here does not entitle it to any additional weight. The object of our inquiry is what the intent of Congress was when § 309 was adopted in 1986, not what Oregon courts may have said about Or. Rev. Stat. § 12.115(1) in 1971.

[3] Compare *City of Aurora v. Am. LaFrance Corp.*, No. 81-C-6638, 1984 U.S. Dist. LEXIS 20667, *2 (Dist. Ill. Jan 6, 1984); *Chamberlain v. Shmutz Mfg. Co.*, 532 F. Supp. 588, 590 (D. Kan. 1982); *Bauld v. J.A. Jones Constr. Co.*, 357 So. 2d 401, 402 (Fl. 1978); *Tindol v. Boston Hous. Auth.*, 487 N.E.2d 488, 489-90 (Cont'd)

context, ambiguity is defined as "[a]n uncertainty of meaning or intention." Black's Law Dictionary (8th ed. 2004). Here, considerable uncertainty about the distinction existed in 1986.[4] Because of this ambiguity it is evident that the term "statute of limitations" had no plain meaning with respect to whether it included statutes of repose when § 309 was adopted.[5] It will therefore be necessary for the Court to examine the

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(Mass. 1986); *James Ferrera & Sons Inc. v. Samuels*, 586 N.E.2d 58, 60-61 (Mass. App. Ct. 1985); *Berry v. Beech Aircraft Corp.*, 717 P.2d 670, 672 (Utah 1985); *City of Dover v. Int'l Tel. & Tel. Corp.*, 514 A.2d 1086, 1089 (De. 1986), *with United States v. Kubrick*, 444 U.S. 111, 117 (1979); *Bridges v. United States*, 346 U.S. 209, 230-31 (1953); *Anderson v. Yungkau*, 329 U.S. 482, 485 (1947); *United States v. Oregon Lumber Co.*, 260 U.S. 290, 300 (1922); *Gates Rubber Co. v. USM Corp.*, 508 F.2D 603, 611 (7th Cir. 1975); *Bolick v. Am. Barmag Corp.*, 306 N.C. 364, 366 (1982).

[4] This becomes clear upon review of the scholarship of the time. For example, one 1980 article suggest that there were at least five definitions of "statute of limitations" in use, while a 1990 article stresses that there is no standard definition and that "[o]lder case-law and treatises use the phrases . . . interchangeably." *See* Francis E. McGovern, *The Variety, Policy and Constitutionality of Product Liability Statutes of Repose*, 30 Am. U.L. Rev. 579, 582 (1980); Lisa K. Mehs, Comment, *Asbestos Litigation and Statutes of Repose: The Application of the Discovery Rule in the Eighth Circuit Allows Plaintiffs to Breathe Easier*, 24 Creighton L. Rev. 965, 966-68 (1990).

[5] Sun cites *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157 (2004), for the proposition that "the Supreme Court has directed that CERCLA be construed according to its text."

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statute's legislative history in order to determine Congress's intent at the time of its adoption.

2. *Burlington Northern*

The district court based its decision that "the plain language of [§ 309] does not extend to statutes of repose . . ." on *Burlington N. & Santa Fe R.R. Co. v. Poole Chem. Co.* 419 F.3d 355, 363 (5th Cir. 2005). *Burlington Northern* involved two large above ground storage tanks in Slanton, Texas, that were sold by Skinner Tank Company ("Skinner") to Poole Chemical Company ("Poole"), an agricultural blender, on October 28, 1988. *Id.* at 358. On January 29, 2003, one of the tanks ruptured, releasing several hundred thousand gallons of chemicals onto Poole's property and an adjacent railroad right-of-way. *Id.* On April 19, 2004, Poole sued Skinner, alleging that the tank Skinner sold to it was defective. *Id.* "Section 16.012 of the Texas Civil Practice and Remedies Code establishes a 15-year statute of repose for products liability cases." *Id.* Because suit was filed more than fifteen years after the sale of the tanks, if Texas's statute of repose applied, Poole would not prevail. The district court granted Skinner's motion for summary judgment on several grounds, and the Fifth Circuit affirmed, stating in pertinent part that the plain language of CERCLA § 309 does not extend to statutes

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(Br. of Appellee 13.) This misrepresents the much narrower holding of *Cooper*, that CERCLA § 113(f)(1) has a plain meaning in relation to the issues in that case and therefore it was unnecessary for the Court to look to CERCLA's purpose to aid interpretation.

of repose. *Id.* at 364. Although the court noted that "courts considering the applicability of [§ 309] have not always clearly distinguished a statute of repose from a statute of limitations," *Id.* at 362-63, it failed to address the question of whether the term was ambiguous when it was adopted and instead held itself "bound by [the] plain language, absent express congressional intent to the contrary." *Id.* at 364. It then failed to find express congressional intent. *Id.*

We believe the district court's reliance on *Burlington Northern* is misplaced. After a review of the legislative history, the court in *Burlington Northern* stated that "Congress intended for [§ 309] to preempt a state statute of limitations that deprives a plaintiff who suffers a long-latency disease caused by the release of a hazardous substance of his cause of action, but not to preempt a state statute of repose like [Texas's]." *Id.* However, that court pointed out that the case before it "does not involve the delayed discovery for which [§ 309] was intended to address. The case does not implicate a long-latency disease or involve a situation where the time for filing a claim expired before the plaintiff learned that a hazardous substance caused his injury." *Id.* at 365. This case does. Unlike the chemical spill in *Burlington Northern*, which was discovered before the expiration of time under the statute of repose, in this case the McDonalds did not discover the mercury in the calcine until after the statute had run. Because the discovery in *Burlington Northern* occurred prior to the expiration of time under the statute of repose, § 309's policies against destroying a plaintiff's claims before they could

be asserted underlying § 309 were not in issue. However, they are in issue in this case. Moreover, the *Burlington Northern* court failed to analyze the meaning of "statute of limitations" at the time § 309 was adopted. Therefore, the district court was mistaken in relying on that case when it held that Or. Rev. Stat. § 12.115(1) was not preempted by § 309.

3. Legislative History

Having determined that the term "statute of limitations" was ambiguous at the time CERCLA § 309 was adopted with respect to whether the term includes statutes of repose, the Court's next task is to review the legislative history of the section in order to determine Congress's intent. Two significant items of legislative history referencing this issue appear in the record. The first is a committee print filed under Section 301(e) of CERCLA which

> recommends that all states that have not already done so, clearly adopt the rule that an action accrues when the plaintiff discovers or should have discovered the injury or disease and its cause. The Recommendation is intended also to cover the repeal of the statutes of repose which, in a number of states have the same effect as some statutes of limitation in barring plaintiff's claim before he knows that he has one.

Superfund Section 301 (e) Study Group, 97th Cong., Injuries and Damages from Hazardous Wastes—Analysis and Improvement of Legal Remedies 256

(Comm. Print 1982) (the "301(e) Report"). The second is from the House Conference Report, H.R. Conf. Rep. No. 99-962, at 261 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3276, 3354 (the "Conference Report"), which immediately preceded enactment of the Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (1986), which adopted § 309. The Conference Report, referring to CERCLA § 309, states that "this section addresses the problem identified in the 301(e) study." *Id.* The Conference Report also states that

> State statutes of limitation define the time in which an injured party may bring a lawsuit seeking compensation for his injuries against the party alleged to be responsible for those injuries . . . . In the case of a long-latency disease, such as cancer, a party may be barred from bringing his lawsuit if the statute of limitations begins to run at the time of the first injury—rather than from the time when the party "discovers" that his injury was caused by the hazardous substance or pollutant or contaminant concerned.

Id. Taken together, the reports show that Congress's primary concern in enacting § 309 was to adopt the discovery rule in situations where a plaintiff may lose a cause of action before becoming aware of it—precisely the type of circumstance involved in this case. This predicament can be caused by either statutes of limitation or statutes of repose, and is probably most likely to occur where statutes of repose operate. Thus,

given the ambiguity of the term "statute of limitations" at the time of the adoption of § 309, taken alongside the only evidence of Congressional intent, it is evident that the term "statute of limitations" in § 309 was intended by Congress to include statutes of repose.

Sun argues that because the 301(e) Report differentiated between statutes of limitation and statutes of repose that Congress, by only using the former term, evidenced intent to exclude the latter. However, this approach ignores the Conference Report, which states that the statute "addresses the problem identified in the 301(e) study." 301(e) Report, at 256. The problem of plaintiffs losing their cause of action before they know they have it could not have been addressed unless statutes of repose were addressed.

Sun cites the 301(e) Report for the proposition that statutes of repose are excluded because "the question is when the statute begins to run—the time when the action accrues . . . ." Sun asserts that use of the word "accrues" in the report, a word which typically applies to discovery of injury in statutes of limitations cases, is evidence that Congress intended to exclude statutes of repose from the definition of statutes of limitation. However, the cases Sun cites do not support this proposition. For example, in *Freier v. Westinghouse Elec. Corp.*, 303 F.3d 176, 196-97 (2d Cir. 2002), the court stated that it is "indisputedly clear that Congress intended, in the cases to which [§ 309] applies, that the [Federally Required Commencement Date] preempt state law accrual rules . . . ." However, this says nothing about whether Congress intended that § 309 apply to

statutes of repose. Statements that Congress clearly intended § 309 to preempt state law accrual rules are not evidence that those are the only rules it intended to preempt.

Next, Sun argues that Congress could not have been ignorant of statutes of repose because it has enacted several of them. Sun cites four sections of the United States Code that contain provisions which would qualify as statutes of repose under the definition discussed above. From this Sun concludes that Congress knew the distinction when it omitted statutes of repose from § 309. It is telling, however, that none of the four sections cited by Sun use the phrase "statute of repose." In fact, an electronic search of the text of the United States Code also fails to reveal a single instance of the phrase "statute of repose." The fact that Congress knew how to enact a statute of repose, but to date has chosen not to label any as such is not legislative intent that supports Sun. Rather, it is additional evidence that the term "statute of limitations" was ambiguous.

Sun also argues that § 309 is inapplicable by its own terms because it requires "personal injury, or property damages, which are caused or contributed to by exposure to any hazardous substance, or pollutant or contaminant, released into the environment from a facility . . . ." 42 U.S.C. § 9658(a). There are no known personal injuries here. Sun argues there are also no property damages caused by a release into the environment. Even if one ignores the difference in value between mercury-free calcine and the calcine the McDonalds received, there is still damage in the form

of $70,000 in cleanup costs associated with the spreading of the calcine on Mr. McDonald's driveway and parking lot. Sun's argument that under the statute there was no property damage caused by a release into the environment lacks merit.

Lastly, Sun argues that the negligence claim is invalid because the alleged violations are within the scope of contractual duties. It is true that in order to "bring a tort claim based on conduct that is also a breach of a contract, a plaintiff must allege . . . [that a breach of an] independent standard of care stems from a particular special relationship between the parties." *Strader v. Grange Mut. Ins. Co.*, 39 P.3d 903, 906 (Or. Ct. App. 2002). Sun characterizes the conduct that it claims gives rise to both the negligence and contract claims as a "failure to provide mercury-free calcine and associated omissions and misrepresentations." However, the negligence claim is not based on any alleged promise to provide mercury-free calcine, but rather on alleged failures to warn about the mercury in the calcine and to test the calcine. A jury could find that there was no oral agreement, but that Sun was negligent in failing to warn that, for example, the calcine was not tested. The negligence claim should not have been dismissed.

B. CONTRIBUTION

The district court also granted summary judgment to Sun on the McDonalds' claim for contribution under Or. Rev. Stat. § 465. The statute provides that a class of persons "shall be strictly liable for those remedial action costs incurred by the state or any other person that are

attributable to or associated with a facility and for damages for injury to or destruction of any natural resources caused by a release . . . ." Or. Rev. Stat. § 465.255(1). "Remedial action costs" are defined as "reasonable costs which are attributable to or associated with a removal or remedial action at a facility, including but not limited to the costs of administration, investigation, legal or enforcement activities, contracts and health studies." *Id.* at § 465.200(24). For there to be reasonable costs, there must first be a removal or remedial action. A "remedial action" is an action "consistent with a permanent remedial action taken instead of or in addition to removal actions in the event of a release or threatened release of a hazardous substance into the environment, to prevent or minimize the release of a hazardous substance so that it does not migrate to cause substantial danger to present or future public health, safety, welfare or the environment." *Id.* at (23).

The issue for the Court is whether remedial action must be initiated by the government, or whether a private party may bring the remedial action. The district court and Sun take the view that, for "remedial action" to exist, the State must undertake, require, or oversee the action. We agree. Section 465.315(1)(b) anticipates that the Director of the DEQ "shall select or approve remedial actions . . ." and §465.400(2) directs DEQ to "adopt rules establishing the levels, factors, criteria or other provisions for the degree of cleanup including . . . the selection of remedial actions necessary to assure protection of the public." Pursuant to § 465.400(2), DEQ engaged in rulemaking resulting in Or. Admin. R. § 340-

122-0071(3), which states that "[a]fter a site evaluation is completed, [DEQ] will determine whether a preliminary assessment, removal, remedial action, other action, or no further action is needed at the facility." This rule suggests that the determination whether remedial action will occur will be made by DEQ, after a preliminary assessment is made, and not by the parties. Therefore, in order to proceed with remedial action, it was necessary for the McDonalds to get approval from DEQ. As they did not, the district court's grant of summary judgment on this issue will be affirmed.

C. BREACH OF CONTRACT

The McDonalds asserted a breach of contract claim based upon an alleged oral warranty by Sun's Wally Freeman that the calcine was free of mercury. The district court granted summary judgment to Sun on this claim, citing the parol evidence rule and the merger doctrine. The McDonalds argue that it was error to grant summary judgment on either of these grounds. Because the Court concludes that the district court properly granted summary judgment to Sun based upon the parol evidence rule, we affirm the district court's grant of summary judgment to Sun on the breach of contract claim and find it unnecessary to reach the merger doctrine issue.

1. Parol Evidence Rule

Oregon's statutory parol evidence rule states that "[w]hen the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms, and therefore there can be

. . . no evidence of the terms of the agreement, other than the contents of the writing . . . ." Or. Rev. Stat. § 41.740. "The term 'agreement' includes deeds . . . as well as contracts between parties." *Id.* However, the rule does not bar evidence extrinsic to the writing unless the writing is an integrated agreement. *Abercrombie v. Hayden Corp.*, 883 P.2d 845, 850 (Or. 1994) (citing *Land Reclamation v. Riverside Corp.*, 492 P.2d 263 (Or. 1972)). An agreement is integrated if "the parties intended [it] to be a final expression of some or all of the terms . . . ." *Abercrombie*, 883 P.2d at 850; *see also* Restatement (Second) of Contracts § 209 (1979); 2 Farnsworth, Farnsworth on Contracts § 7.3 (1990); Calamari & Perillo, Contracts § 3-3 (3d ed 1989). If a writing is completely integrated, it may not be contradicted or supplemented by prior terms. *Abercrombie*, 883 P.2d at 851. However, if it is partially integrated, evidence of prior consistent, additional terms is allowed so long as such terms do not contradict the writing. *Id.* Whether the parties intended a writing to be integrated or not and whether an integrated writing is completely or partially integrated are both questions of fact for the court. *Abercrombie*, 883 P.2d at 851. The court may consider all the circumstances, including parol evidence, to determine whether the parties intended the writing to be a complete or partial integration. *Id.* "An integrated writing is partially integrated if the writing omits a consistent, additional agreed-upon term, which was (1) agreed to by the parties for separate consideration, or (2) such a term as in the circumstances might naturally be omitted from the writing." *Id.*

In this case, it is undisputed that if the alleged warranty that the calcine was free of contamination had been made, the warranty would be consistent with the terms of the deed. It is similarly clear that there was no separate consideration for the alleged warranty. The key issue therefore is whether the alleged warranty "might naturally be omitted from the writing." Restatement (Second) of Contracts § 216 cmt. d. (1979).

The district court found that Mr. McDonald, as the owner of a number of businesses, a party to numerous real estate transactions, and user of the property for a business purpose, was a sophisticated businessman and that "parties with business experience are more likely to reduce their entire agreement to writing than parties without such experience . . . ." *Hatley v. Stafford*, 588 P.2d 603, 609 (Or. 1978). The court also found that the deed was prepared by Mr. McDonald's attorney and that it expressly addressed the issue of calcine and did not offer any warranties concerning its commercial viability. Taken together, these circumstances show that if there had been a prior oral agreement warranting the calcine, it would have been unnatural for Mr. McDonald's attorney to omit that term from the deed. For these reasons, we affirm the district court's grant of summary judgment to Sun on the parol evidence rule issue and the contract claim.

D. FRAUD

Last, the McDonalds argue that the district court erred when it sustained Sun's motion for summary judgment and dismissed their fraud claim. In order to succeed on their fraud claim, it is the McDonalds' burden to show by clear and convincing evidence:

(1) a representation;

(2) its falsity;

(3) its materiality;

(4) the defendant's knowledge of its falsity or ignorance of its truth;

(5) the defendant's intent that the representation should be acted on by the plaintiff and in the manner reasonably contemplated;

(6) the plaintiff's ignorance of its falsity;

(7) the plaintiff's reliance on its truth;

(8) the plaintiff's right to rely on the representation;

(9) and the plaintiff's resulting injury.

Smallwood v. Fisk, 934 P.2d 557, 559 (Or. App. 1997) (citing *Rice v. McAlister*, 519 P.2d 1263 (Or. 1974)). The key issue here is whether Sun's employee Freeman knew that his alleged statement that there was no mercury in the calcine was false when he made it or that he was ignorant regarding its truth or falsity. The McDonalds

concede that no evidence in the record directly proves what Freeman knew about the cleanliness of the calcine at the time of the negotiations. The McDonalds argue that a jury could find that in 1973 Freeman was reckless to rely on antiquated 1958 field testing designed only to evaluate whether there was commercially recoverable mercury in the calcine when he allegedly made the statement to McDonald, or that he was reckless because of the high probability that he knew nothing about Sunoco's 1958 field assay. We disagree. The McDonalds offered no evidence to support these theories. The only evidence in the record bearing on Freeman's mental state at the relevant time is that tests conducted during the 1930s, 1940s, and 1950s would have shown that all of the mercury had been removed from the calcine, that by 1973 common assay methods would still not have detected mercury in the calcine, and that calcine was used in road construction at least into the 1980s.

The McDonalds suggest that because there is no evidence that Freeman ever went to the mine before meeting with McDonald, because there is no evidence that Cordero Mining ever reported the results of its field assays to corporate, because "[e]vidence about what Freeman knew or did not know about the calcine is conspicuously absent from the voluminous documents produced by Sunoco," and because they are entitled to all reasonable inferences at summary judgment, that they have shown that the "record fails to establish that Freeman had *any* basis for representing the calcine to be mercury-free." (Appellants' Reply Br. 26 (emphasis in original).) However, this statement ignores the burden of proof. The McDonalds had the burden of presenting

evidence sufficient that a reasonable jury could find by clear and convincing evidence that Freeman made the statements with ignorance as to their truth. It was not Sun's burden to show that Freeman had a basis for making the statements; it was the McDonalds' burden to show that he did not. The McDonalds provide no evidence about Freeman's knowledge of falsity, and therefore they cannot meet their burden. The district court's grant of summary judgment on the fraud issue will be affirmed.

IV. CONCLUSION

The district court erred in granting summary judgment to Sun on the McDonalds' negligence claim and that claim is remanded for trial. The district court correctly concluded that summary judgment was proper on the McDonalds' contribution, breach of contract and fraud claim. Each party shall pay their own costs.

AFFIRMED in part, REVERSED in part, and REMANDED.

APPENDIX B — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON DATED MARCH 14, 2006

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

Civil No. 03-1504-HA

THOMAS MCDONALD; MARIAN MCDONALD; and ALEX E. MCDONALD,

Plaintiffs and Counterclaim Defendants,

v.

SUN OIL COMPANY, SUNOCO, INC., and CORDERO MINING COMPANY,

Defendants and Counterclaim Plaintiffs,

THOMAS MCDONALD and MARIAN MCDONALD, and ALEX E. MCDONALD,

Third-Party Plaintiffs,

v.

J.T. BATTERSON and SUSAN BATTERSON,

Third-Party Defendants.

HAGGERTY, Chief Judge:

OPINION AND ORDER

This suit arises out of a deed sale to plaintiffs Thomas McDonald and Marian McDonald of more than 2600 acres of real property located in Jefferson County, Oregon. The purchase included the Horse Heaven Mine

Property, an allegedly contaminated property (hereinafter referred to as the "Site" or "Horse Heaven").

In 2003, plaintiffs filed a Complaint against the sellers alleging breach of contract and fraud. Plaintiffs also allege violations of O.R.S. § 465.250 *et seq.* (Oregon's "Superfund" statute) and 42 U.S.C. § 9600 *et seq.* (CERCLA) and seek cost recovery, contribution, and a declaratory judgment regarding alleged contamination that defendant's[1] mining operations caused on the Site and to plaintiffs' residence property (hereinafter referred to as the "McDonald Ranch").

Defendants counterclaimed against plaintiffs for contribution and cost recovery for the Site. In April 2004, plaintiffs filed a third-party complaint against J.T. Batterson and Susan Batterson (the Battersons) seeking cost recovery and contribution if plaintiffs were found liable to defendant on the counterclaims.

Plaintiffs, defendant, and third-party defendants each seek summary judgment [110, 107, 101]. Defendant filed two motions to strike portions of the declarations of Thomas McDonald, Alex McDonald, and Marian McDonald [120, 160]. Plaintiffs also filed a motion in limine for sanctions and to remedy spoliation of evidence [172]. Oral argument on the motions was heard on January 30, 2006.

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[1] Sun Oil Company was the predecessor of Sunoco, Inc., and Cordero Mining Company was a subsidiary of Sunoco, Inc. that was dissolved in 1975. The three defendants are hereinafter collectively referred to as defendant or Sunoco.

Appendix B

I. FACTUAL BACKGROUND

Mercury mining operations began on the Site in 1934 under the direction of Horse Heaven Mines, Inc. (HHM). In 1936 defendant acquired all of HHM's stock. Mining operations continued until 1944 when a fire destroyed the mining facilities. In 1946, HHM sold all of its mining interests in Jefferson County to Cordero Mining Company, a solely owned subsidiary of defendant, and defendant dissolved HHM. Mining operations began again at the Site in 1955 and ceased in 1958.

In 1973, defendant conveyed over 2600 acres to plaintiffs, including the Site, via a Bargain and Sale Deed (1973 Deed). At the time of this purchase, the Site contained calcine tailings. Calcine tailings are remnants left after mercury has been extracted from rocks. According to plaintiffs, Wally Freeman (Freeman), a representative of defendant, informed Mr. McDonald that the calcine tailings had been put through a process whereby all mercury and any residual contaminants were removed. The 1973 Deed expressly reserved defendant's interests in the sub-surface mineral rights located at the Site, but transferred defendant's rights in the calcine tailings to plaintiffs.

In 1976 plaintiffs sold all their property by Warranty Deed except the forty acres containing the Site. In 1982, plaintiffs deeded these forty acres to Ray Whiting (Whiting), one of HHM's original founders, as payment for advice and assistance given during plaintiffs' purchase of the real property from defendant. In that

transaction, plaintiffs reserved their rights to the calcine tailings on the Site until 2007. The Site was then conveyed to Whiting's daughter and grandson, third-party defendants Susan Batterson and J.T. Batterson (collectively the Battersons).

In 2001, the Oregon Department of Environmental Quality (DEQ) requested information from defendant regarding possible contamination on the Site. In 2002, DEQ determined that plaintiff's handling of the tailings had created an environmental release and ordered plaintiffs to refrain from removing or disturbing the tailing piles on the Site without DEQ approval.

Plaintiffs aver that when they purchased the 2600 acres, defendant made intentionally or recklessly false representations that the calcine tailings present on the Site portion of the acreage were commercially valuable and that all traces of mercury had been extracted out of the tailings. Plaintiffs further aver that defendant made these representations with the intent to induce plaintiffs to purchase the property. Plaintiffs claim that they relied on these representations regarding the calcine tailings in deciding to purchase the entire 2600 acres, and were damaged as a result of this reliance.

II. STANDARDS

Under Federal Rule of Civil Procedure 56(c), summary judgment is appropriate only where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment

as a matter of law." The moving party has the burden of demonstrating the absence of a genuine issue of fact for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). If the moving party satisfies this burden, the opponent must set forth specific facts showing that there remains a genuine issue for trial. Fed. R. Civ. P. 56(c).

A non-moving party who bears the burden of proof at trial to an element essential to its case must make a showing sufficient to establish a genuine dispute of fact with respect to the existence of that element of the case or be subject to summary judgment. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Such an issue of fact is only a genuine issue if it can reasonably be resolved in favor of either party. *Anderson*, 477 U.S. at 250-51. This burden to demonstrate a genuine issue of fact increases where the factual context makes the non-moving party's claim implausible. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Mere disagreement or the bald assertion that a genuine issue of material fact exists no longer precludes invoking summary judgment. *Cal. Architectural Bldg. Prods., Inc. v. Franciscan Ceramics, Inc.*, 818 F.2d 1466, 1468 (9th Cir. 1987). In other words, "[w]hen the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita*, 475 U.S. at 586 (footnote omitted). "If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Anderson*, 477 U.S. at 249-50 (citations omitted).

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III. ANALYSIS

1. Plaintiffs' Motion in Limine

Defendant's experts, Mr. Donald Haas and Dr. Kathryn Johnson, prepared reports setting forth their opinions and provided plaintiffs with all materials considered in developing those opinions. They included no notes or drafts in that submission. Plaintiffs also omitted any notes or drafts in their expert submissions to defendant.

Defendant submitted a request to plaintiffs under Federal Rule of Civil Procedure 34 (Rule 34) for all documents reviewed or relied upon by plaintiffs' experts, including notes and drafts. Plaintiffs did not serve such a request on defendant. Following the deposition of Mr. Haas, plaintiffs sent an e-mail to defense counsel requesting expert report drafts and notes. This request was made at the close of discovery, in conjunction with a motion to extend discovery deadlines for a seventh time. Defense counsel filed an objection to the request to extend discovery.

On July 1, 2005, plaintiffs withdrew their request to extend discovery and did not submit a request for the information pursuant to Rule 34. Six weeks later, plaintiffs filed their first Motion in Limine for Sanctions and to Remedy Spoliation of Evidence.

Despite the lack of a Rule 34 request, in early August defendant produced to plaintiffs (1) copies of all draft reports prepared by the experts, including those with defense counsel's red-lined editorial comments;

(2) all e-mail and postal mail correspondence between counsel and the experts; (3) all available handwritten notes taken by the experts; and (4) copies of articles and other publications reviewed by the experts, including highlighting, underlining and/or notes. Plaintiffs then withdrew their motion in limine.

Over four months after defendant's production, and after the summary judgment motions were briefed, plaintiffs filed a second Motion in Limine for Sanctions and to Remedy Spoliation of Evidence. Plaintiffs assert that defendant's experts destroyed drafts of their expert reports and other discoverable notes, resulting in prejudice to plaintiffs and compelling exclusion of the expert testimony or an appropriate jury instruction. Plaintiffs contend there was spoliation of handwritten notes taken by the experts and that this spoliation deprives them of any opportunity to either determine the admissibility of the experts or to properly cross-examine them. Plaintiffs also allege that defense counsel improperly exerted control over the experts' opinions.

Federal Rule of Civil Procedure 26(a)(2)(B) (Rule 26) requires the disclosure of an expert's identity, a handwritten report containing a statement of all opinions and the basis for those opinions, and the data considered by the expert in forming the opinion. This rule does not require the production of an expert's working notes. *Gillespie v. Sears, Roebuck & Co.*, 386 F.3d 21, 34-35 (1st Cir. 2004). Subsequent to the 1993 amendments to Rule 26, courts have held that disclosure of information transmitted to or from the expert, including draft reports, is discoverable if the expert considered the

information. *See Fidelity Nat. Title Ins. Co. of N.Y. v. Intercounty Nat'l Title Ins. Co.*, 412 F.3d 745, 751 (7th Cir. 2005) ("A testifying expert must disclose and therefore retain whatever materials are given him to review in preparing his testimony, even if in the end he does not rely on them in formulating his expert opinion.") (citations omitted); *see also Trigon Ins. Co. v. United States*, 204 F.R.D. 277, 282-83 (E.D. Va. 2001); *B.C.F. Oil Refining, Inc. v. Consolidated Edison Co. of New York, Inc.*, 171 F.R.D. 57, 63 (S.D.N.Y. 1997); *Karn v. Ingersoll Rand Co.*, 168 F.R.D. 633, 635-38 (N.D. Ind. 1996); *United States v. City of Torrance*, 163 F.R.D. 590, 592-94 (C.D. Cal. 1995). There is a split in authority regarding information given to an expert that contains attorney work product. The *Torrance* court noted that "the approach which is most consistent with the purpose of the Federal Rules of Civil Procedure is to require disclosure." *Torrance*, 163 F.R.D. at 593.

Defendant provided plaintiffs with all drafts and correspondence between the experts and defense counsel. The only information not produced were some working notes that the experts failed to retain. This information is not subject to Rule 26 disclosure.

Even assuming that the information sought was subject to disclosure, there are no grounds for an adverse inference that is required for spoliation sanctions. *See Trigon*, 204 F.R.D. at 287 (an adverse inference requires more than negligent loss, it "requires a showing that the party knew the evidence was relevant to some issue at trial and that his willful conduct resulted in its loss or destruction" and "some quantum of

blameworthiness is required") (quotation and citations omitted). There is no showing that the destroyed notes would have been relevant to some issue at trial, or that the experts or counsel knew of this relevance. Experts have "no legal duty to be a pack rat" and are not "required to retain every scrap of paper" created in preparing their opinions. *Fidelity National*, 412 F.3d at 751. It was reasonable for the experts to assume that retention of those notes was unnecessary.

Moreover, plaintiffs fail to establish the kind of prejudice from the loss of the experts' notes that is required for Rule 37 sanctions. Rule 37 sanctions are warranted for failure to disclose "without substantial justification" unless "such failure is harmless." Fed. Rule Civ. Pro. 37(c). The type of evidence that has been destroyed in this case is not related to a challenge of an expert's admissibility, as expert admissibility focuses "solely on principles and methodology, not on the conclusions" of the expert. *Daubert v. Merrill Dow Pharm., Inc.*, 509 U.S. 579, 595 (1993). Plaintiffs have received all necessary information relating to the basis of the experts' opinions and their methodology.

Plaintiffs also assert that they cannot properly cross-examine the experts because they cannot fully determine the extent to which the expert opinions were tainted by communications with counsel. However, this court concludes that all communications with counsel have been provided to plaintiffs. Moreover, the central inquiry on cross-examination of an expert "is not the question of if and to what extent the expert was influenced by counsel," but instead asks for the basis of

the expert's opinion. *Nexxus Products Co. v. CVS New York, Inc.*, 188 F.R.D. 7, 10 (D. Mass. 1999) (distinguished on other grounds by *Adler v. Shelton*, 778 A.2d 1181 (N.J. Super. 2001). "Examination and cross-examination of the expert can be comprehensive and effective on the relevant issue of the basis for an expert's opinion without an inquiry into the lawyer's role in assisting with the formulation of the theory." *Bogosian v. Gulf Oil Corp.*, 738 F.2d 587, 595 (3d Cir. 1984).

Plaintiffs also argue that the experts' opinions are biased and were improperly influenced by defendant. The suggestions made by defendant were editorial in nature and in conjunction with guidance from counsel that the experts' judgment should govern and they should only make changes they deemed accurate. Counsel does not act improperly by "offering editorial suggestions, which the expert [is] free to accept or reject." *Goins v. Angelone*, 52 F. Supp.2d 638, 664 (E.D. Va. 1999).

2. Third-party Defendants' Motion for Summary Judgment

Plaintiffs sued defendant for cost recovery of remedial action costs under O.R.S. 465.255, and for contribution for remedial action under O.R.S. 465.325. Defendant counterclaimed against plaintiffs for cost recovery under O.R.S. 465.255 and CERCLA § 107(a) and for contribution for remedial actions defendant has incurred under O.R.S. 465.257 and CERCLA § 107(a). Plaintiffs then sued the Battersons for the same four claims that defendant alleged against plaintiffs, seeking

recovery from the Battersons if plaintiffs are found liable for any of the counterclaims brought against them by defendant.

Defendant has agreed to dismiss its cost recovery claims under O.R.S. 465.255 and CERCLA § 107(a). Accordingly, plaintiffs' cost recovery claims (the First and Third Claims) against the Battersons are dismissed.

As to the contribution claims, plaintiffs have sued the Battersons for recovery of any amount for which plaintiffs are found liable as a potentially responsible party (PRP). The Battersons seek summary judgment on these claims.

The liability between PRPs under CERCLA is limited to each party's equitable share of the total liability. *Western Prop. Serv. Corp. v. Shell Oil Co.*, 358 F.3d 678, 685 (9th Cir. 2004) (between PRPs there is only a claim for contribution and the liability corresponds to each party's equitable share of total liability and is not joint and several); *Pinal Creek Group v. Newmont Mining Co.*, 118 F.3d 1298, 1306 (9th Cir. 1997) (a PRP is limited to a contribution claim and "cannot assert a claim against other PRPs for joint and several liability"). PRPs can bring a third party action seeking direct contribution from additional PRPs.

Here, plaintiffs did not bring a direct claim for contribution against the Battersons, but instead chose to bring a claim for reimbursement of their own contribution liability. The Third Party Complaint states:

> If Third-Party Plaintiffs are found liable for contribution to Sunoco for any remedial action

> costs Sunoco incurs or incurred, Third-Party Defendants are liable for those contribution costs as current or former owners of the Horse Heaven Property.

Corrected Third Amended Complaint, ¶ 13.

This falls outside the proper scope of contribution claims between PRPs. Plaintiffs seek reimbursement from the Battersons for the equitable share of costs that is allotted to plaintiffs. The Battersons can be held responsible to plaintiffs only for direct contribution of any costs that constitute the Batterson's equitable share. Plaintiffs never requested leave from the court to amend the Complaint to bring a proper claim for contribution. Accordingly, third-party plaintiffs' motion for summary judgment is granted.

3. Defendant's Motion for Summary Judgment

Defendant moves for summary judgment against all of the claims brought by plaintiffs. They are discussed in turn below.

A. Claim One: Breach of Contract

Plaintiffs brought a breach of contract claim against defendant, alleging that defendant represented orally and in the 1973 Deed that the calcine on the Site had commercial value. In response to defendant's summary judgment motion, plaintiffs rely exclusively on the alleged oral representation Freeman made at the time of the sale.

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Defendant argues that any purported oral agreement is barred by the parol evidence rule and the doctrine of merger. The parol evidence rule provides:

> When the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms, and therefore there can be, between the parties and their representatives or successors in interest, no evidence of the terms of the agreement, other than the contents of the writing, except where a mistake or pleadings or where the validity of the agreement is the fact in dispute. However this section does not exclude other evidence of the circumstances under which the agreement was made, or to which it relates, as defined in O.R.S. 42.220, or to explain an ambiguity, intrinsic or extrinsic, or to establish illegality or fraud. The term "agreement" includes deeds and wills as well as contracts between parties.

O R.S. 41.740.

Application of the parol evidence rule depends on whether the writing is integrated. An integrated writing is a final expression of the terms of the parties' agreement. Whether the parties intended the writing to be integrated is a question of fact for the court, not the jury. *Ambercrombie v. Hayden Corp.*, 883 P.2d 845, 850 (Or. 1994) (citation omitted). In determining whether a writing was meant to be integrated, the court may review all relevant evidence, including parol evidence. *Id.* at 851.

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A court should look to the writing itself when deciding the issue of integration, because "the apparent completeness and detail of the writing itself may lead the court to conclude the parties intended the writing to be a complete integration of their agreement." *Hatley v. Stafford*, 588 P.2d 603, 609 (Or. 1978). Additionally, a court "should be aware of the fact that parties with business experience are more likely to reduce their entire agreement to writing than parties without such experience, and that this is especially true when the parties are represented by counsel on both sides." *Id.* In reviewing the viability of an oral term, a court should examine "whether the asserted oral term is such that the parties, under the circumstances, might naturally have omitted it from the writing." *State ex rel. Cipriano v. Triad Mech., Inc.*, 925 P.2d 918, 924 (Or. App. 1996).

The 1973 Deed was prepared for McDonald by his own attorney and sets forth in detail the terms of the conveyance. The 1973 Deed states that defendant conveys rights to the "buildings, improvements, privileges, hereditaments, and appurtenances to the same belonging or in anywise appertaining." Declaration of James T. Esselman, Exhibit F. It also specifies that defendant retains "all of the oil, gas, and other mineral rights thereon" but that defendant does not reserve rights to "surface rocks, such as agates, or other surface materials which are used for road-building or construction purposes, such as granite, marble, limestone, gravel, clay, caliche, calcine, gravel, and sand." *Id.*

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Plaintiff Thomas McDonald has testified that he owned a number of businesses, engaged in numerous real estate transactions, and bought the property for a business purpose. He was represented by counsel, and it was his counsel who prepared the 1973 Deed. These parties were sophisticated and likely would reduce their final agreement to writing.

Moreover, the alleged oral representations regarding the calcine would likely not have been omitted from the writing. The 1973 Deed expressly addresses the issue of calcine and offers no warranties as to its commercial viability.

Plaintiffs argue the deed was not integrated because it did not contain an integration clause. However, "the mere absence of an integration clause is insufficient to rebut the presumption of complete integration." *Triad*, 925 P.2d at 924.

The court finds the 1973 Deed was fully integrated. Evidence of any oral agreements is barred by the parol evidence rule.

Evidence of any oral agreement is also barred by the merger doctrine. The merger doctrine provides that when a deed is delivered pursuant to the terms of a previous agreement, the deed supercedes the contract as to all provisions. *Archambault v. Ogier*, 95 P.3d 257, 261 (Or. App. 2004) (citations omitted).

Plaintiffs argue that the alleged oral promises regarding the calcine were collateral to the deed and thus not superceded by it. "[C]ontractual provisions that

are not included in the deed and do not affect the title, possession, quantity, or emblements of the land are deemed collateral to the promise to convey . . . and merge only to the extent that the parties intended the deed to be the final memorial of their bargain." *Id.* at 261 (quotation and citations omitted). The 1973 Deed specifically addresses calcine. The argument by plaintiffs that the alleged calcine representations were a collateral oral agreement is without merit. *Id.*

B. Claim Two – Fraud

Defendant also seeks summary judgment on plaintiffs' claim for damages based on fraudulent representations allegedly made by Freeman on behalf of defendant at the time of sale. To succeed on a fraud claim, plaintiffs must show by clear and convincing evidence that (1) defendant made a material representation; (2) the representation was false; (3) defendant knew it was false or acted recklessly without any knowledge of its truth; (4) it was made with the intention it should be acted upon by plaintiffs; (5) plaintiffs were ignorant of its falsity; (6) plaintiffs acted in reliance on its truth; (7) plaintiffs had a right to rely on the representation; and (8) plaintiffs suffered an injury. *Smallwood v. Fisk*, 934 P.2d 557, 559 (Or. App. 1997) (citation omitted). Recklessness as to the truth of an assertion is demonstrated by a "definite statement of a material fact made by a party who does not know the statement to be true, and has no reasonable grounds for believing it to be true." *Amort v. Tupper*, 282 P.2d 660, 664 (Or. 1955).

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Plaintiffs assert defendant was reckless in that it operated the mine and other mercury mines, failed to test the calcine when it sold the property in 1973, and Freeman represented that the calcine was free of mercury while lacking knowledge regarding the truth of the assertion.

There is no dispute that defendant had tested the calcine during mining operations in the late 1950s, using the standard laboratory equipment at that time, and that those tests concluded there was no mercury in the calcine. In reality, there was one-half of one percent of mercury remaining. Defendant's Ex. R, Expert Report of Dr. Kathryn Johnson, at 8.

Defendant admits it did not re-test the calcine in 1973 when it sold the property. However, plaintiffs offer no evidence that a prudent seller in defendant's position would have re-tested the calcine. There is no evidence in the record that at the time of sale anyone expressed concern about health hazards relating to the calcine.

Moreover, any statement by Freeman in 1973 that calcine could be used on roads was true at the time made and for decades thereafter. Thomas McDonald testified that at the time of the purchase he was aware that Jefferson County used the calcine from the Site in its road constructions. He also testified that after the purchase he used the calcine for his roads, and that Jefferson County continued to use the calcine from the Site for its roads.

Plaintiffs fail to meet their burden of establishing a question of fact relating to the recklessness of Freeman's alleged representation.

C. Claim Three: Negligence

Plaintiffs allege that defendant knew or should have known that the mining waste was hazardous and that the extraction process to remove all the contamination was unreliable. Plaintiffs assert that defendant failed to take reasonable care in testing the calcine, failed to warn plaintiffs of hazards, and that it was foreseeable the calcine would contain or release mercury. Plaintiffs seek (1) $1,200,000 in damages calculated as to the loss of value in the calcine currently as compared to the value it would have if usable for roads; (2) additional damages for costs to investigate and/or remediate the McDonald Ranch and the Horse Heaven property; (3) damages for mental anguish; and (4) punitive damages.

Defendant argues that this claim is barred by the Oregon Statute of Repose. Section 309 of CERCLA preempts state statutes of limitation, allowing untimely actions to go forward, but is silent regarding state statutes of repose. Section 309 of CERCLA provides:

> (a) state statutes of limitations for hazardous substance cases
>
> (1) Exception to State statutes
>
> In the case of any action brought under State law for personal injury, or property damages, which are caused or contributed to by exposure to any hazardous substance, or pollutant or contaminant, released into the environment from a

> facility, if the applicable limitations period for such action (as specified in the State statute of limitations or under common law) provides a commencement date which is earlier than the federally required commencement date in lieu of the date specified in such State statute.

42 U.S.C. § 9658(a).

Plaintiffs oppose defendant's motion by relying on a ruling that held § 309 of CERCLA preempted the Oregon Statute of Repose. *Buggsi, Inc. v. Chevron U.S.A., Inc.*, 857 F. Supp. 1427 (D Or. 1994). The *Buggsi* court did not analyze the difference between a statute of repose and a statute of limitations.

Subsequent to *Buggsi*, the Fifth Circuit Court of Appeals held that "the plain language of § 9658 does not extend to statutes of repose," but only to statutes of limitation and that the "differences between statutes of limitations and statutes of repose are substantive, not merely semantic." *Burlington N. & Santa Fe Ry. Co. v. Poole Chem. Co.*, 419 F.3d 355, 362 (5th Cir. 2005). The *Burlington* court acknowledged that courts have sometimes failed to distinguish a statute of repose from a statute of limitations when analyzing the applicability of this section of CERCLA, and cited *Buggsi* and other cases. Nevertheless, the court noted that these types of statutes are quite different. *Id.* at 363. A statute of limitations establishes a time period in which there is a right to sue after a plaintiff receives an injury, and a

statute of repose establishes a right not to be sued after a legislatively determined period from an act by defendant. *Id.*

This court agrees with the analysis of the *Burlington* court that there is a substantive difference between a statute of limitations and a statute of repose, and that § 309 of CERCLA extends only to statutes of limitations. Accordingly, defendant is entitled to summary judgment because plaintiffs' negligence claim is barred by Oregon's Statute of Repose.

a. Punitive Damages

Plaintiffs seek punitive damages under the negligence claim. As the court has found the negligence claim is barred by the statute of repose, the punitive damages claim fails for the same reason.

Assuming *arguendo*, the punitive damages claim could be reviewed on its merits, it still fails. In analyzing the fraud claim above, the court found that defendant's conduct failed to meet the standard of recklessness. Plainly, defendant's conduct did not rise to the level of malice, a reckless and outrageous indifference to a highly unreasonable risk of harm, or a conscious indifference to the health, safety and welfare of others, as is required for punitive damages. O.R.S. 31.730 (2003).

b. Mental Anguish

Mental anguish absent physical harm may be pursued only for a violation of a legally protected interest of a plaintiff apart from an ordinary tort claim for negligence. *Hammond v. Cent. Lane Comm. Ctr.*, 816

P.2d 593, 596 (Or. 1991) (citing *Nearing v. Weaver*, 670 P.2d 137, 140 (Or. 1983)). Oregon courts have interpreted "legally protected interest" as requiring a duty distinct from the duty under negligence to avoid the foreseeable risk of harm. *Curtis v. MRI Imaging Serv. II*, 941 P.2d 602, 608 (Or. App. 1997). Here, defendant had no such duty. Accordingly, plaintiffs mental anguish claim fails.

D. Claim Four: Negligence *Per Se*

Plaintiffs allege two claims of negligence *per se*. If proved, such claims would result in strict liability for defendant. Plaintiffs allege defendant violated the Oregon Hazardous Waste Statute and a regulation promulgated under the Oregon Solid Waste Act. In order to state a claim for negligence *per se* under a statute, plaintiffs must allege that (1) defendant violated a statute; (2) plaintiffs were injured as a result of that violation; (3) plaintiffs were a member of the class of persons meant to be protected by the statute; and (4) the injury plaintiffs suffered is of a type that the statute was enacted to prevent. *McAlpine v. Multnomah County*, 883 P.2d 869, 873 (Or. App. 1994).

For negligence *per se* based on violations of an administrative regulation rather than a statute, the statute must support a private right of action under the *McAlpine* four-part test. *Ettinger v. Denny Chancler Equip. Co., Inc.*, 910 P.2d 420, 422 (Or. App. 1996).

a. Oregon Hazardous Waste Law

Plaintiffs claim defendant violated the labeling requirements of O.R.S. 453.035. Under the terms of the

statute, those labeling requirements would not take effect until labeling standards were adopted by the State Health Officer. Plaintiffs acknowledge the necessary standards were adopted after the sale of the Site at issue in this case, but argue that the Act itself established some labeling requirements prior to the adoption of the standards.

Section 5 of the Act states:

> (1) The State Health Officer shall adopt standards for the labeling of hazardous substances.
>
> ***
>
> (2) the State Health officer shall require:
>
> [Nine items that must be included in the regulations, but which are not relevant to this court's analysis.]

Oregon Laws 1971, c. 409, § 5(1) - (2).

The legislature did not frame the nine items as direct requirements to the regulated community, but as points to be included in the regulations promulgated by the State Health Officer. Accordingly, no immediate effect on the regulated community was intended.

Plaintiffs also argue that this section was meant to have immediate effect because the statute prohibits any misbranded hazardous substance, and "misbranded hazardous substances" is defined as "a hazardous substance that does not meet the labeling requirement of O.R.S. 453.035 [the nine items in 5(2) above]." O.R.S. 453.005(13). Plaintiffs argue that if the legislature meant

for those items to become effective only after the promulgation of regulations, they would have made the definition "a hazardous substance that does not meet the labeling requirements of regulations promulgated under O.R.S. 453.035." Pls. Reply Br. at 30.

The plain language of O.R.S. 453.035 states that the State Health Officer shall promulgate regulations, and gives some requirements for those regulations. Identifying a misbranded substance as one that does not follow section 5 fails to negate the specific language of 5(1) requiring regulations be promulgated. This court concludes that the labeling requirements were not in effect at the time of the 1973 Deed.

Even if the labeling requirements were in effect at the time plaintiffs purchased the Site, the *McAlpine* factors still must be established to succeed on a claim for negligence *per se*. Plaintiffs fail to meet this burden.

The Act defines a hazardous substance as one which "may cause substantial personal injury or substantial illness during or as a proximate cause of any customary or reasonably foreseeable handling or use, including reasonably foreseeable ingestion by children." Oregon Laws 1971, c. 409, § 1(7)(a). This law was modeled after a federal law, which both parties agree is inapplicable to purchasers of calcine in a commercial land sale. Plaintiffs argue reference to the federal law is inappropriate, yet offer no evidence that the Oregon law differs in any substantial manner from the federal law in order to preclude such a comparison. The legislative history of the Oregon Act indicates that the legislature was

concerned with the same issue that the federal law addressed – protecting children from dangerous household products. Additionally, Oregon courts have recognized that federal case law may be used to construe state statutes that are patterned upon a federal statute. *Badger v. Paulson Inv. Co.*, 803 P.2d 1178, 1182 (Or. 1991). Plainly, plaintiffs fall outside the class of persons the statute was designed to protect, and plaintiffs fail to meet the third prong of the *McAlpine* test.

Plaintiffs also cannot satisfy the injury requirement of the *McAlpine* test. To meet this test, plaintiffs must prove they were injured and that their particular injury is the type that the statute was meant to protect. Plaintiffs do not claim any physical injury. The only injury plaintiffs claim is economic, and, as evidenced by the language of the statute, such injuries fall outside the scope of the statute.

b. Oregon Safe Storage Regulation

Plaintiffs also argue defendant violated O.A.R. 340-61-070(1), a regulation establishing standards for the safe storage of solid waste, which was promulgated under the Solid Waste Management Act. This claim also fails to meet the requirements of the *McAlpine* test.

Plaintiffs cannot establish the first requirement, that defendant violated the regulation through improper storage of the calcine. At the time of the land sale, the calcine was not a solid waste, and was not subject to the regulation. The Solid Waste Management Act defines waste as "useless or discarded" materials. O.R.S. 459.005(24). At the time of the sale, the calcine at issue

had been used by Jefferson County for road construction, and was considered valuable by plaintiffs. It was not a "useless or discarded" material.

Plaintiffs also cannot establish the third and fourth factors of the *McAlpine* test. The statute's enforcement provision provides a mechanism for the Environmental Quality Commission to enforce its regulations, not for a private party in plaintiffs' position to file a private right of action. Moreover, plaintiffs have alleged no health-related injury, which is the type of injury the regulation was intended to prevent.

E. Claim Five: Cost Recovery Under Oregon Law

Plaintiffs acknowledge that PRPs are not entitled to cost recovery under Oregon law. Accordingly, they dismiss their cost recovery claim with respect to the McDonald Ranch. As to the Horse Heaven property, plaintiffs assert cost recovery is property because they are not PRPs under Oregon law.

PRPs include:

> (a) Any owner or operator at or during the time of the acts or omissions that resulted in the release;
>
> (b) Any owner or operator who became the owner or operator after the time of the acts or omissions that resulted in the release, and who knew or reasonably should have known of the release when the person first became the owner or operator.

Appendix B

* * *

> (d) Any person who, by any acts or omissions, caused, contributed to or exacerbated the release, unless the acts or omissions were in material compliance with applicable laws, standards, regulations, licenses or permits.

O.R.S 465.255(1)

Plaintiffs Thomas and Marian McDonald expressly reserved "the calcine dump located on the property and the right of removal of the calcine for twenty-five years" when they conveyed the property. Affidavit of Stephen L. Naito, Ex. 1. Accordingly, they have owned and operated the calcine since 1973, and will own it until February 4, 2007.

In Oregon, an owner of property on which contaminants were placed is not a statutorily innocent party, even if the owner did not know about the contamination, did not give permission, derived no benefit or use, and did not receive any enhancement in property value. *Newell v. Weston*, 946 P.2d 691 (Or. App. 1997). The *Newell* court found that a property owner who was unaware that a tank that leaked contaminants was placed on his property was a PRP, but under equitable considerations had no liability. Here, a claim of statutory innocence is misplaced, because plaintiffs Thomas and Marian McDonald were the owners of the Site and remain the owners of the calcine, even if they were unaware of the contamination. Moreover, they derived benefit from the calcine.

This court has also found purchasers of contaminated property to be PRPs even though they did not know of the contamination but failed to conduct "all appropriate inquiry" into the history of the property. *Catellus Dev. Corp. v. L.D. McFarland Co.*, 910 F. Supp. 1509, 1513 n.1 (D. Or. 1995) (reviewing and adopting the prior findings and recommendations of the Magistrate Judge).

Under CERCLA, in determining whether all appropriate inquiries were conducted, a court reviews any searches conducted of historical sources and public records; relevant specialized knowledge; the relationship of the purchase price to the value of the property if the property was not contaminated; commonly known or reasonably ascertainable information about the property; the degree of obviousness of the presence or likely presence of contamination; and the ability to detect the contamination by appropriate investigation. 42 U.S.C. § 9601(35)(B)(iii).

Here, plaintiffs Thomas and Marian McDonald knew the property had been a mercury mine, understood that mercury was dangerous, and were aware that some bricks on the property were contaminated. Defendant's Ex. RR, Deposition of Thomas McDonald, at page 13, lines 16-19 (knew the Site was a former mercury mine); page 166, lines 19-23 (knew mercury was dangerous); page 216, lines 5-17 (knew the brick firehouse was contaminated with mercury). They should have conducted appropriate inquiries into any other potential contamination. In arguments to this court, plaintiffs

have asserted that tests were available at the time of the purchase that would have detected the mercury in the calcine. Thomas McDonald also testified that he felt the calcine was a "sleeper" part of the purchase because it had greater value than was being attributed to it within the land sale. Defendant's Ex. E, Deposition of Thomas McDonald, at page 63, line 10 - page 64, line 2. After weighing the CERCLA factors listed above, the court finds that the McDonalds failed to conduct all appropriate inquiries.

Plaintiffs Thomas and Marian McDonald are PRPs under Oregon law for the Horse Heaven property and therefore cannot seek cost recovery. Accordingly, defendant is granted summary judgment on plaintiffs' cost recovery claim.

F. Claim Six: Contribution Under Oregon Law

Oregon law allows recovery of "reasonable costs which are attributable to or associated with a removal or remedial action at a facility." O.R.S. 465.200(24). Plaintiffs assert a remedial action on the McDonald Ranch and seek contribution for that action. Remedial action is defined as:

> those actions consistent with a permanent remedial action taken instead of or in addition to removal actions in the event of a release or threatened release of a hazardous substance into the environment, to prevent or minimize the release of a hazardous substance so that it does not migrate to cause substantial

> danger to present or future public health, safety, welfare or the environment.

O.R.S. 465.200(23)

Plaintiffs assert that under Oregon law there is no requirement of government involvement as a prerequisite for asserting remedial action. Plaintiffs rely on the language of the statute that allows "any person" to file a claim for contribution. O.R.S. 465.325(6)(a). Plaintiffs also argue that a requirement of government involvement would render redundant the clause allowing a PRP who has cooperated with the government to sue another PRP for contribution.

However, requiring government involvement for a remedial action does not conflict with "any person" being able to file a claim for contribution – once it has been determined by the government that remedial action is required, then any person can file a claim for contribution. Additionally, government involvement does not render redundant the clause allowing parties who have cooperated with the government to sue those who did not cooperate. Once the government determines that remedial action is required, some parties cooperate and some do not. The clause protects those who cooperate and allows them to recover from those who do not.

In Oregon, the DEQ undertakes or requires a remedial action. O.R.S. 465.260; O.R.S. 465.325; *see also Boeing Co. v. Cascade Corp.*, 920 F. Supp. 1121, 1124 (1996) (noting that the ultimate remedial action and the extent of the remediation are controlled by Oregon's DEQ and the federal Environmental Protection Agency

either through consent decrees or mandate). The Oregon Administrative Rules state that when DEQ learns of a potential release it "shall" evaluate and "will" determine whether "assessment, removal, remedial action, or other action is needed." O.A.R. § 340-122-0071(1) & (3). Here, DEQ has evaluated the McDonald Ranch and has determined that remedial action is not required. Its tests revealed the mercury levels (8.18 mg/kg) were below the state's residential maximum (80mg/kg).

Plaintiffs are not permitted to undertake investigations on the McDonald Ranch, make improvements to the land, call it a remedial action, and then demand cost recovery or contribution. Defendant is entitled to summary judgment on plaintiff's contribution claim.

G. Claims Seven and Eight: Declaratory Judgment

Plaintiffs seek declaratory relief, alleging that although DEQ has not ordered any remediation, plaintiffs may still incur remedial costs in the future. Plaintiffs seek declaratory relief to avoid future repetitive, wasteful litigation.

Declaratory relief is allowable only as to a justiciable controversy that can affect the present rights of the parties. "To be justiciable, a controversy must involve a dispute based on present facts rather than on contingent or hypothetical events." *TVKO v. Howland*, 73 P.3d 905, 908 (Or. 2003) (citations omitted); O.R.S. 28.010 (Oregon Declaratory Judgment Act). Oregon's

DEQ has not asked plaintiffs to perform remediation on the McDonald Ranch, and defendant has performed the work DEQ requested on the Horse Heaven property voluntarily. Accordingly, addressing the merits of this lawsuit resolves the parties' justiciable disputes. Any future claims for relief by plaintiffs are speculative.

Additionally, a court should refuse issuing a declaration "where a special statutory remedy has been provided, or where another remedy will be more effective or appropriate under the circumstances." *Brooks v. Dierker*, 552 P.2d 533, 536 (Or. 1976). Here, plaintiffs seek statutory relief for their alleged harm. Accordingly, defendant's motion for summary judgment as to plaintiffs' declaratory judgment must be granted.

4. Plaintiffs' Motion for Summary Judgment

Plaintiffs move for summary judgment against defendant's four counterclaims and five of defendant's affirmative defenses. Plaintiffs also seek summary judgment for their negligence *per se* claims.

By this Opinion and Order, summary judgment is granted against plaintiffs' negligence *per se* claims, so plaintiffs' motion on those claims is denied as moot. In light of the court's related decisions, plaintiffs' motion for summary judgment against defendant's affirmative defenses is also denied as moot. Defendant withdraws Counterclaims One and Three, leaving only Counterclaims Two and Four before the court as remaining targets for plaintiffs' motion for summary judgment.

Appendix B

A. Counterclaim Two – Contribution Under Oregon Law

Defendant counterclaimed for contribution under ORS 465.257 for both the Horse Heaven property and the McDonald Ranch. Plaintiffs seek summary judgment on this counterclaim as to the McDonald Ranch on grounds that defendant has incurred no costs related to the ranch. However, plaintiffs sued defendant for contribution for costs relating to the cleanup of the McDonald Ranch. Defendant's counterclaim ensures that plaintiffs' liability is included in any apportionment of the McDonald Ranch cleanup costs in the event defendant is found liable for such costs. Because defendant is granted summary judgment as to the cleanup costs at the McDonald Ranch, defendant has no liability at the McDonald Ranch. Accordingly, this portion of the counterclaim is dismissed as moot.

As to the Horse Heaven property, plaintiffs argue they are not PRPs and cannot be sued for contribution. In the analysis of defendant's Motion for Summary Judgment above, this court found that plaintiffs Thomas and Marian McDonald are PRPs with respect to the Horse Heaven property. Accordingly, this part of plaintiffs' Motion for Summary Judgment is denied as to Thomas and Marian McDonald. Alex McDonald, however, is not a PRP with respect to the Horse Heaven property, as he is not, and has never been, the owner or operator of the calcine or the Site. Accordingly, summary judgment is granted as to Alex McDonald.

B. Counterclaim Four – Contribution under CERCLA

Defendant brought this counterclaim under CERCLA § 107. Plaintiffs seek summary judgment against defendant's counterclaim for contribution under CERCLA, asserting that such claim cannot be brought unless there is an underlying civil action.

CERCLA was amended in 1986 to include an express action for contribution for PRPs under § 113(f). Prior to this amendment, courts found contribution actions were authorized implicitly under § 107. *Key Tronic Corp. v. United States*, 511 U.S. 809, 816 (1994) (citing cases). After the amendment, the two provisions are viewed as providing "somewhat overlapping" contribution remedies. *Id.*

Under CERCLA, § 113, parties who are PRPs may sue for contribution only if there has been a civil action under § 106 or § 107. *Cooper Ind., Inc. v. Aviall Serv., Inc.*, 543 U.S. 157, 166 (2004). The *Aviall* Court acknowledged that § 113 contained a saving clause that "rebuts any presumption that the express right of contribution provided by the enabling clause is the exclusive cause of action for contribution available to a PRP." *Id.* at 166-167. The *Aviall* Court declined to decide whether there was an implied right of contribution under § 107, but noted that in enacting § 113, Congress had explicitly recognized a particular set of contribution rights previously implied by courts. *Id.* at 170-171.

The Ninth Circuit Court of Appeals addressed these sorts of claims as follows:

> Together, § 107 and § 113 provide and regulate a PRP's right to claim contribution from other PRPs. While § 107 created the right of contribution, the machinery of § 113 governs and regulates such actions, providing the details and explicit recognition that were missing from the text of § 107. [This court] held that the enactment of § 113 in 1986 did not replace the implicit right to contribution many courts had recognized in § 107(a); rather, § 113 determines the contours of § 107, so that a claim for contribution requires the "joint operation" of both sections.

Western Props., 358 F.3d at 685 (citing *Pinal Creek*, 118 F.3d at 1301-02, 1306).

Because the *Availl* decision did not address contribution claims under § 107, district courts in the Ninth Circuit have continued to follow binding Ninth Circuit precedent, holding that there remains a right of contribution under § 107 regardless of the existence of prior litigation, albeit in unpublished decisions. *See, e.g. Aggio v. Aggio*, 2005 WL 2277037, at *5-6 (N.D. Cal. Sept. 19, 2005); *Ferguson v. Arcata Redwood Co.*, 2005 WL 1869445, at *6 (N.D. Cal. Aug. 5, 2005); *Kotrous v. Goss-Jewett Co. of N. California, Inc.*, 2005 WL 1417152, at *2 (E.D. Cal. June 16, 2005).

This case is analogous to the *Catellus* case. The *Catellus* court addressed a situation similar to that which defendant faces in this case:

> Plaintiffs cannot sue under the express provisions of § 107 because they are PRPs, and they cannot sue under § 113 because they have neither been ordered by EPA to clean up the site nor been sued by a non-liable party for cost recovery. However, as stated above, § 113(f)(1) expressly reserved actions for contribution in the absence of a civil action under § 106 or § 107. Therefore, a private right of contribution under § 107(a) continues to exist as a viable cause of action.

Catellus, 910 F. Supp. at 1515 (citations omitted).

Here, defendant is assisting voluntarily in the assessment and cleanup of the Horse Heaven property. This negates the need for litigation.

This court concludes that the *Western Properties* and *Pinal Creek* decisions rule properly that when there has not been a civil action, there still remains a private right of action for contribution under § 107. When a plaintiff falls outside the technical requirements of § 113, the contribution claim is allowed under § 107, and the mechanics of apportionment are governed by the factors established in § 113.

Plaintiffs also move for summary judgment because they are not PRPs under CERCLA. Plaintiffs contend that they possess only an easement, and so are not

owners of the calcine pile. However, as discussed above, plaintiffs Thomas and Marian McDonald retained full rights to the calcine and are its owners. A party is a PRP under CERCLA if the party is the current owner or operator of a "facility." 42 U.S.C. § 9607(a)(1). A facility is any site where a "hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located." 42 U.S.C. § 9601(9). The term is construed broadly. *See 3550 Stevens Creek Assocs. v. Barclays Bank of Cal.*, 915 F.2d 1355, 1360 n.10 (9th Cir. 1990). Accordingly, those plaintiffs, but not Alex McDonald, are PRPs under CERCLA.

Plaintiffs also assert a third-party defense available under CERCLA. This defense applies when (1) the release was caused solely by a third party; (2) the third party was not an employee/agent of plaintiffs; and (3) plaintiffs exercised due care with respect to the hazardous substance. 42 U.S.C. § 9607(b)(3). This defense is construed narrowly. *Lincoln Props., Ltd. v. Higgins*, 823 F. Supp. 1528, 1539 (E.D. Cal. 1992).

Due care is established when the purchaser had no reason to know there was contamination at the time of purchase and the purchaser made "all appropriate inquiries" into the previous ownership and uses of the property. 42 U.S.C. § 9601 (35)(A)-(B). Due care also requires prompt attention to any environmental hazard, including attempts at removal or other remedies. § 9601(40)(D).

As discussed above, plaintiffs Thomas and Marian McDonald knew that the property contained a mercury

mine, knew the bricks on the property contained dangerous levels of mercury, and knew that mercury was a dangerous substance. Accordingly, plaintiffs should have conducted "all appropriate inquiries," but failed to do so. Moreover, the only remediation efforts performed by the McDonalds is having experts review the file and visit the site for this lawsuit. Accordingly, plaintiffs fail to meet the requirements of CERCLA's third-party defense.

5. Defendant's Motions to Strike

Defendant's moved to strike portions of the declarations of Thomas, Marian and Alex McDonald that were filed in support of plaintiffs' motion and in opposition to defendant's motion. In light of the court's ruling granting defendant's Motion for Summary Judgment, these motions are denied as moot.

IV. CONCLUSION

For the reasons provided above, plaintiffs' Motion in Limine [172] is DENIED, third-party defendants' Motion for Summary Judgment [101] is GRANTED; defendant's Motion for Summary Judgment [107] is GRANTED; defendant's Motions to Strike [120, 160] are DENIED as moot; and plaintiffs' Motion for Summary Judgment [110] is GRANTED IN PART as follows: defendant's Counterclaims One and Three are voluntarily dismissed, defendant's Counterclaims Two and Four are dismissed against defendant Alex McDonald, but remain against defendants Thomas and Marian McDonald.

IT IS SO ORDERED.

DATED this 14 day of March, 2006.

ANCER L. HAGGERTY
United States District Judge

APPENDIX C — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON DECIDED JUNE 22, 2006

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

Civil No. 03-1504-HA

THOMAS MCDONALD; MARIAN MCDONALD; and ALEX E. MCDONALD,

Plaintiffs and Counterclaim Defendants,

v.

SUN OIL COMPANY, SUNOCO, INC., and CORDERO MINING COMPANY,

Defendants and Counterclaim Plaintiffs,

THOMAS MCDONALD and MARIAN MCDONALD, and ALEX E. MCDONALD,

Third-Party Plaintiffs,

v.

J.T. BATTERSON and SUSAN BATTERSON,

Third-Party Defendants.

June 22, 2006, Decided

OPINION

ORDER

HAGGERTY, Chief Judge:

Appendix C

In an Opinion and Order dated March 14, 2006, this court granted summary judgment on all claims against defendants and third-party defendants, leaving only two counterclaims filed by defendant Sunoco remaining in the case. Plaintiffs claims for breach of contract, fraud, negligence, negligence *per se*, contribution under Oregon law, and cost recovery under Oregon law have been dismissed. The remaining counterclaims by defendant are for contribution under 42 U.S.C. § 9600 *et seq.* (CERCLA) and Oregon Law. Defendant Sunoco now brings a Motion for Entry of Final Judgment on All of Plaintiffs' Claims [184]. Plaintiffs object to this motion on the ground that the pending counterclaims are based on the same nucleus of facts and could result in multiple appeals.

Federal Rule of Civil Procedure 54(b) authorizes a court to enter final judgment "as to one or more but fewer than all of the claims or parties." *Fed. R. Civ. Pro. 54(b).* Judgment under *Rule 54(b)* "is proper if it will aid 'expeditious decision' of the case. *Texaco, Inc. v. Ponsoldt,* 939 F.2d 794, 797 (9th Cir. 1991) (quoting *Sheehan v. Atlanta Int'l Ins. Co.*, 812 F.2d 465, 468 (9th Cir. 1987)). *Rule 54(b)* certification is not proper if it will result in "piecemeal appeals in cases which should be reviewed only as single units," but the *Rule 54(b)* claims "do not have to be separate from and independent of the remaining claims." *Id. Rule 54(b)* certification is permitted "even though the remaining claims would require proof of the same facts involved in the dismissed claims." *Id.* at 798.

Rule 54(b) certification is proper, despite overlapping facts, when the only remaining claims are counterclaims that arise out of the same transaction or occurrence. *See Wood v. GCC Bend, LLC.*, 422 F.3d 873, 881 (9th Cir. 2005); *see also Curtiss-Wright Corp. v. Gen. Elec. Co.*, 446 U.S. 1, 9, 100 S. Ct. 1460, 64 L. Ed. 2d 1 (1980); *Cold Metal Process Co. v. United Eng'g & Foundry Co.*, 351 U.S. 445, 451-52, 76 S. Ct. 904, 100 L. Ed. 1311 (1956); *Sheehan*, 812 F.2d at 468. Here, judgment under *Rule 54(b)* would aid in the expeditious decision of the case. The only remaining claims are counterclaims, and they will require proof of only a small portion of the facts involved in the dismissed claims.

Moreover, there is little risk of "piecemeal" appeals in this case. The counterclaims for contribution were not dismissed at summary judgment because plaintiffs are potentially responsible parties (PRPs) under CERCLA and could not establish statutory innocence as a matter of law. However, it is the court that allocates response costs between PRPs, taking into consideration "such equitable factors as it finds appropriate." *42 U.S.C. § 9613(f)(1)*. Courts often consider several factors, which are known as the "Gore factors," including distinguishability of discharge; amount of hazardous waste involved; degree of toxicity; degree of involvement by each PRP in generating, transporting, treating, storing or disposing of the waste; degree of care exercised; and degree of cooperation with authorities. *Boeing Co. v. Cascade Corp.*, 920 F. Supp. 1121, 1132 (D. Or. 1996). Considering the equitable factors applicable in this case, plaintiffs' equitable share of the response

costs is likely zero. Accordingly, there is a low probability of multiple appeals in this case.

Defendant's Motion for Entry of Final Judgment on all of Plaintiffs' Claims [189] is GRANTED.

IT IS SO ORDERED.

DATED this 22 day of June, 2006.

/s/ Ancer L. Haggerty
United States District Judge